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AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED,

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OF

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OF

THE HIGH COURT OF JUSTICE.

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BENGAL SECRETARIAT LIBRARY.

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

LII. VICTORIÆ.

HOWARD *v.* BEALL.

1889
May 21.

Practice—Evidence—Inspection of Bankers' Books—Bankers' Books Evidence Act, 1879 (42 & 43 *Vict. c.* 11) s. 7.

The Bankers' Books Evidence Act, 1879, gives power to order inspection of entries in bankers' books relating to banking accounts kept in the names of other persons besides the parties to the action.

APPEAL by the defendant from an order made at chambers by Stephen, J., under the Bankers' Books Evidence Act, 1879. (1)

The action was brought for misrepresentation alleged to be contained in the prospectus of a company, and the plaintiff claimed rescission of his contract, and damages.

The order granted inspection of entries in bankers' books relating to banking accounts kept in the names of persons other than the defendant, on the ground that the accounts were kept on the defendant's behalf.

(1) 42 & 43 Vict. c. 11, s. 7, by which "On the application of any party to a legal proceeding a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs."

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Herbert Reed, for the defendant. So far as the order gives inspection of entries relating to accounts kept in the names of persons other than the defendant, it is made without jurisdiction. The Act was passed for the relief of bankers, and was not intended to be used for the purpose of obtaining inspection. It is true that s. 7 contains the words "any entries," but Order XXXVII., r. 7, of the Rules of the Supreme Court, 1883, is equally comprehensive in its terms, and under that rule an order cannot be made for inspection of the books of persons who are not parties to the action: *Central News Co.* v. *Eastern Telegraph Co.* (1); *Straker* v. *Reynolds.* (2)

T L. Wilkinson, for the plaintiff, was not called on.

MATHEW, J. I can see no reason to doubt that this order was properly made. On applications of this nature it is the duty of the judge to satisfy himself that the entries of which inspection is sought will be admissible in evidence at the trial of the action. Mr. Reed does not dispute that the banking accounts kept by either of the parties to the action may be inspected. In the present case the learned Judge before whom the application came at chambers thought that although the other accounts were not kept in the name of the litigant, they were in substance and in fact kept on his behalf. The appeal therefore will be dismissed with costs.

GRANTHAM, J. I am of the same opinion. It is admitted that these entries in the bankers' books would be admissible in evidence at the trial, so that, if there was power to make the order, it ought to be upheld, and I am of opinion that there was such power.

Appeal dismissed.

Solicitors for plaintiff: *Greenop & Sons.*
Solicitors for defendant: *Beall & Co.*

(1) 53 L. J. (Q. B. D.) 236.

(2) 22 Q. B. D. 262.

P. B. H.

McGRAH *v.* CARTWRIGHT.

1889
May 7.

Practice—County Court—Appeal from—County Court Judge's Notes—Duty of Appellant to supply Copies of Notes for use on Appeal—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 121—*Order* LVIII., *r.* 11—*Order* LIX., *rr.* 13, 17.

Order LIX., r. 13, which makes it the duty of the Master of the Crown Office, upon the entry of an appeal from an inferior Court, to apply to the judge of the inferior Court for a copy of his notes, is repealed by s. 121 of the County Courts Act, 1888, and it is now the duty of the appellant, as a condition precedent to the appeal being heard, to furnish the Court with a copy of the notes.

APPEAL by the plaintiff from the judgment of a county court.

Upon the appeal being called on it appeared that no copy of the judge's notes had been applied for by or supplied to the Master of the Crown Office, but a copy of the notes signed by the judge was tendered to the Court by the counsel for the plaintiff.

Morton Smith, for the plaintiff. Order LIX., r. 13, which imposes upon the Master of the Crown Office the duty of obtaining a copy of the judge's notes for the use of the Court is not repealed; it is preserved by s. 120 of the County Courts Act, 1888, which expressly affirms the existing rules of the High Court. It is true that s. 121 of the County Courts Act, 1888, gives the parties the power of obtaining a copy of the notes, but that was merely to remedy the inconvenience previously caused by the fact that parties had to appeal without any knowledge of what was in the judge's notes. The provision in that section that the copy signed by the judge is to be used and received at the hearing of the appeal is satisfied by its being handed to the Court when the appeal is called on.

F. R. Anderton, for the defendant, was not heard.

FIELD, J. The question is really a very plain one. Sect. 121 of the County Courts Act, 1888, clearly operates as a repeal of Order LIX., r. 13, and it is now the duty of the appellant under the Appeal Court rule to furnish a copy of the judge's notes to this Court, and this he has not done. Under the circumstances,

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however, of this being a new practice, we will hear the appeal; but in future the rule will be strictly enforced.

CAVE, J. I agree with my brother Field. By Order LIX., r. 17, appeals from county courts are to be governed by the rules in force in respect of appeals from the High Court to the Court of Appeal. Order LIX., r. 13, which made it the duty of the Master of the Crown Office to apply for a copy of the notes of the judge of the inferior Court, was passed in order to enable the Court to see what were the notes of the judge and what was his finding; and the rule was a necessary one, because at the time when it was passed the parties had no power of getting the notes from the judge themselves. The copy of the notes which, by Order LVIII., r. 11, was made necessary for the purpose of the appeal could not be brought before the Court by the parties, and the duty of obtaining it was therefore thrown upon the Master of the Crown Office. Then came the County Courts Act, 1888, which by s. 121 gives the parties themselves the power to obtain a copy of the judge's notes, and which further says that that copy shall be used and received at the hearing of the appeal. As soon as that section was passed, Order LIX., r. 13, was gone; for its object was gone. The parties now have to apply to the county court judge for a copy of his notes, and the copy supplied and signed by him is a material document for the purposes of the appeal; and, that being so, it is the duty of the appellant, under the practice of the Court of Appeal, to supply a copy of it to the judges. But under the circumstances this appeal may be heard.

The appeal was afterwards dismissed upon another preliminary objection.

Solicitor for plaintiff: *Benjamin Greaves.*

Solicitors for defendant: *Kime & Hammond, for Blackhurst, Preston.*

W. J. B.

IN RE LAMB AND ANOTHER. 1889

Practice—Costs—Solicitor and Client—Taxation—Disbursement—Probate Duty —6 & 7 Vict. c. 73, s. 37. *April 30.*

A payment for probate duty made by a solicitor on behalf of his client is a "disbursement" within the meaning of s. 37 of the Solicitors' Act, 1843 (6 & 7 Vict. c. 73), and is properly included in his bill of costs.

APPEAL from Chambers.

A firm of solicitors, who had been employed to do certain probate work for a client, included in their bill of costs for such work a sum of 36*l.* for probate duty paid by them for him; the remaining charges in the bill amounted to about 13*l.* An order for taxation having been obtained, a sum was struck off amounting to more than one-sixth of the bill if the 36*l.* were excluded from the bill, but to less than one-sixth if that charge were included. It was contended on behalf of the client that the 36*l.* was not a disbursement within the meaning of 6 & 7 Vict. c. 73, s. 37, and ought to appear in a separate cash account and not to be included in the bill of costs, and that he was therefore entitled to the costs of the taxation, but the registrar in the Probate Division allowed the charge to be included in the bill. Other work having been done by the same solicitors for the same client, which necessitated a taxation in the Queen's Bench Division, it was agreed that all the bills of costs should be submitted to a master of that Division, who allowed the item to remain in the bill, and whose decision was affirmed by Mathew, J. The client appealed.

Woollett, for the appellant. The sum paid for probate duty is not a "disbursement" within s. 37 of the Solicitors' Act, 1843, and ought to be struck out of the bill of costs, so as to entitle the appellant to the costs of the taxation. Legacy duty is not a payment made by a solicitor acting in his professional capacity, and cannot be included in the bill of costs: *In re Haigh* (1); probate duty is analogous to legacy duty, and sums paid in respect of it should go into the cash account. A solicitor is not

(1) 12 Beav. 307.

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IN RE LAMB.

bound to pay such sums without a special authority from his client, and they are not taxable items.

[He also cited *In re Remnant.* (1)]

Gore, for the respondent, was not called upon.

POLLOCK, B. The question in this case is whether this particular sum of 36*l.* which has been paid by the solicitor should be put in his bill of costs as a portion of the bill; the rest of the costs of the probate work being only about 13*l.*, the presence of this item would affect the costs of taxation if one-sixth of the bill were taxed off. The whole matter commences with the statute, which by s. 37 provides for the delivery of a signed bill of costs before an action is brought for the recovery of any fees, charges or disbursements for any business done by an attorney or solicitor. Is this sum a disbursement? Up to a certain point the guiding line as to what is a disbursement within the meaning of the statute is clear. There are many things which must be paid by the solicitor for his client, and which are obviously disbursements made by him in his character of solicitor. There are frequently large amounts, such as court fees and counsel's fees, which it is the duty of the solicitor, and not of the client, to pay, and which are also disbursements of the solicitor in his professional character; and there are also items such as stamps, fees on the registration of deeds, &c., which are properly called disbursements. And the question whether a particular payment is properly a disbursement cannot depend on its mere amount. On the other side it is clear that where the payment is made by the solicitor purely as an agent, it is in no sense a disbursement by the solicitor in his professional character, and this rule has been applied in many cases. There is too a well-known practice of the profession as to solicitors' disbursements, which is laid down by the taxing masters in the case of *In re Remnant.* (1). In the case of *In re Haigh* (2) it was held that a payment of legacy duty by a solicitor was not a disbursement by him in his character of a solicitor, and could not be properly included in his bill of costs, but it is to be noted that in his judgment the then Master of the Rolls expressly used the word "agent," and based his

(1) 11 Beav. 603. (2) 12 Beav. 307.

judgment upon the payment having been made by him in that character and not as a solicitor. Then there is a question of the distinction between probate and legacy duty, and as to this we are satisfied that the payment of probate duty is analogous to the payment of any other tax upon the subject which must be paid by the solicitor before the client can be in a position to exercise the rights to the exercise of which such payment is a condition precedent. We think that the decision of the learned judge was right; he has drawn the line where it has been drawn for many years by the profession and by judicial decisions.

MANISTY, J. I agree in thinking that this was a disbursement made by the solicitor in the ordinary course of his duty. The case of legacy duty is different; there is no reason why he should pay it, and he would not pay it unless he had a special authorization to pay legacies. But he is employed to obtain probate as he is employed to obtain a conveyance of property, and he must pay the probate duty in the one case just as he must pay the stamp duty in the other. And our decision is fortified by the report of the probate registrar, who says that it is the invariable practice to include sums paid for probate duty in bills of costs as disbursements.

Appeal dismissed.

Solicitor for appellant: *W. Brewer.*
Solicitors for respondents: *Palmer & Bull.*

W. J. B.

1889
May 1.

BARKER AND ANOTHER *v.* HEMPSTEAD.

Practice—Costs—Judgment under Order XIV. *for* 20*l.* *or upwards, Part of Claim —Judgment at Trial for Balance—Less than* 50*l.* *recovered—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 116.

By the County Courts Act, 1888 (51 & 52 Vict. c. 43) s. 116, if in an action founded on contract the plaintiff shall recover a sum of 20*l.* or upwards, but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court. Provided that, if in any action founded on contract the plaintiff shall within twenty-one days after the service of the writ, or within such further time as may be ordered by the High Court or a judge thereof, obtain an order under Order XIV. empowering him to enter judgment for 20*l.* or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court.

The plaintiff, in an action founded on contract, claimed 48*l.* He obtained leave under Order XIV. to sign judgment for 45*l.*, and proceeding to trial recovered the balance of his claim with costs:—

Held, that he was entitled by s. 116 of the County Courts Act, 1888, to the costs of the whole action on the High Court scale, although he had recovered less than 50*l.*

MOTION on appeal from an order of Mathew, J., at chambers directing a review of taxation.

The plaintiffs issued a writ, specially indorsed under Order III., r. 6, to recover 47*l.* 17*s.* 5*d.* for goods sold and delivered, and within twenty-one days after service of the writ obtained an order under Order XIV. empowering them to enter judgment for 45*l.*, leave to defend as to the balance being given. The action proceeded to trial before an official referee, who gave judgment for the plaintiffs for the balance with costs, but refused to certify that there was sufficient reason for bringing the action in the High Court.

The master, on taxation, allowed the plaintiffs their costs of the whole action on the High Court scale. The defendant having applied for a review of the taxation, Mathew, J., in chambers, made an order for review on the basis of allowing the plaintiffs their costs on the High Court scale up to and including the order under Order XIV., and on the county court scale afterwards.

The plaintiffs appealed.

Sills, for the plaintiffs. This question depends upon the construction of the proviso at the end of s. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which provides that "if in any action founded on contract the plaintiff shall within twenty-one days after the service of the writ . . . . obtain an order under Order XIV. empowering him to enter judgment for a sum of 20*l.* or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court." The plaintiffs did obtain such an order within the time limited, and are therefore entitled to the benefit of this proviso. The policy of the Act is to cut down the costs of a plaintiff who has improperly sued in the High Court; the test by which it is to be decided whether the action was properly brought in the High Court is the amount which the plaintiff recovers under Order XIV.: if he so recovers the specified amount, he has properly sued in the High Court, and consequently properly continues to sue there until the end of his action, and is entitled to the full costs of the whole action. This s. 116 impliedly repeals Order LXV., r. 12, for it re-enacts the whole of it, with the addition of the proviso.

Rose-Innes, for the defendant. Order LXV. r. 12, has not been expressly, or impliedly, repealed by this Act, but still continues in operation together with s. 116. The proviso to s. 116 only applies when the order under Order XIV. is a final order which puts an end to the whole action, not when it merely gives judgment for part of the claim and the action goes on: or, at any rate, it only applies to the costs up to and including the order under Order XIV. If the action goes on then Order LXV., r. 12, applies, and the plaintiff must get an order to entitle him to full costs.

FIELD, J. This appeal must be allowed. The learned judge at Chambers decided this matter with very great doubt, and his decision cannot be supported. The legislature provides two modes of recovering debts, the one cheap and speedy in the county courts, the other slower and more expensive in the High Court. The legislature discourages a plaintiff from proceeding in the more expensive court, and to that end provides that if he does not recover 20*l.* in the High Court he shall have no costs, and

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if he recovers 20*l.*, but less than 50*l.*, he shall have no more costs than he would have been allowed in a county court. In all cases, however, it is provided that a judge may make an order that the plaintiff shall have High Court costs if he thinks that there was good ground for suing in the High Court. The question as to what was a sufficient reason came before me in Chambers very early after the making of the Rules of 1883, and it was thought that I had said that the recovery of judgment under Order XIV. was in every case a sufficient reason for suing in the High Court. That, however, was not a correct view of my decision, and I took the earliest opportunity of contradicting it.

Before the County Court Act of 1888 the matter of costs in such cases as this was governed by Order LXV., r. 12, and there were then numerous applications in chambers for orders for costs on the High Court scale. That rule is now superseded by s. 116 of the Act, which in effect re-enacts that rule and preserves the power of a judge to give costs on the High Court scale. At the end of s. 116, however, a proviso is introduced, which says that "if in any action founded on contract the plaintiff shall within twenty-one days after the service of the writ . . . . obtain an order under Order XIV. empowering him to sign judgment for a sum of 20*l.* or upwards he shall be entitled to costs according to the scale in force for the time being in the Supreme Court." In this case the plaintiffs have complied with the terms of that proviso, for they have obtained an order within the time limited empowering them to sign judgment for 45*l.* There was a small sum left in dispute, and the action went on before an official referee, and the plaintiffs recovered the balance in dispute, thus recovering in the action a sum of 20*l.* and upwards, but less than 50*l.* The plaintiffs therefore claim the costs of the whole action on the High Court scale, because they have complied with the terms of the proviso to s. 116.

It is urged by the defendant that this proviso only applies to the costs which have been incurred up to and including the order under Order XIV., because the policy of the Act is only to give costs on the High Court scale in respect of any benefit obtained under Order XIV. But, in my opinion, the policy of the Act is to encourage proceedings in the High Court when the benefit of

Order XIV. can be obtained, and to provide that such actions are not improperly brought in the High Court. If the plaintiff recovers 20*l.* under Order XIV. it is clear that, according to the policy of the Act, he rightly commenced his action in the High Court, and therefore rightly went on with his action in the High Court. The plaintiffs are, therefore, entitled to their costs of the whole action on the High Court scale, and this appeal must be allowed.

CAVE, J. I am of the same opinion. We have, in this case, to construe for the first time the proviso to s. 116 of the County Courts Act, 1888. That section commences by dealing with *actions* brought in the High Court, and goes on in sub-s. 1 to deal with the costs of the *action*: in sub-s. 2, and in the proviso, it speaks of costs only; but from the previous part of the section it is clear that the costs of the *action* are dealt with all through, and that the costs dealt with in the proviso are the costs of the action, unless there is something in the proviso itself to cut down that meaning. There is nothing whatever to limit that meaning, and therefore the plaintiffs are entitled to their costs of the action on the High Court scale.

Appeal allowed.

Solicitors for the plaintiff: *I. H. Tyas & Huntington for Hand, Nuneaton.*

Solicitors for the defendant: *Lewis & Churchman.*

H. D. W.

1889
June 1.

[IN THE COURT OF APPEAL.]

JAMES *v.* JAMES AND BENDALL.

*Arbitration—Application for Leave to revoke Submission—Arbitrator making a Mistake of Law in a Matter within his Jurisdiction—*3 & 4 *Wm.* 4, *c.* 42, *s.* 39.

Where parties have agreed to refer questions in dispute between them to arbitration, the mere fact that the arbitrator in the course of the proceedings is making a mistake of law in a matter within his jurisdiction does not entitle the party dissatisfied with the arbitrator's view to come to the Court and claim as of right leave to revoke the submission. There is power to give leave to revoke the submission in such a case which may be exercised under exceptional circumstances, but it is a matter of discretion depending on the circumstances of the particular case.

Where an arbitrator had power by the terms of the reference to decide the question of liability before dealing with the question of damages, and the parties agreed that he should exercise such power, and he accordingly did decide the question of liability before dealing with the damages:—

Held, that the Court would not afterwards give the party against whom he had decided leave to revoke the submission on the ground that he had decided wrongly in point of law.

East and West India Docks Co. v. *Kirk and Randall* (12 App. Cas. 738) considered.

APPEAL of the defendant Bendall from the decision of the Queen's Bench Division (1) refusing leave to revoke a submission to arbitration.

The facts were in substance as follows. An action had been brought by the executrix of one William James, a solicitor deceased, for the detention of certain deeds, documents, and papers. The documents in question were documents belonging to clients of the testator, which had been entrusted to him in the course of his business, and other documents relating to his affairs. The defendant James did not appear. The defendant Bendall's statement of defence was in substance that the plaintiff had entered into an agreement with the defendants with regard to the testator's business by virtue of which the goodwill of the business was transferred to the defendants, and that such goodwill included the right to possession of such documents as were necessary

(1) 22 Q. B. D. 669.

for preserving the business of the different clients so far as the assignor had a right to possession. By an order made by consent of the parties the action and all matters in difference were referred to an arbitrator, who by the terms of the order was to have power to deal with the question of liability before dealing with the question of damages. Among the questions raised before the arbitrator were questions (1) whether upon the true construction of the agreement it amounted to a transfer of the business or only gave plaintiff an option to employ the defendants to wind up the business; and (2) whether, if the agreement amounted to an assignment of the goodwill, it gave the defendants the right to the possession of the clients' papers as against the plaintiff.

An affidavit made by the plaintiff's solicitor stated that upon the opening of the reference it was distinctly agreed between the parties that the arbitrator should decide these questions of liability in the first instance before dealing with the question of damages; and that the arbitrator accordingly adjourned the reference till the next day to consider his decision, and on the next day gave his decision orally, deciding the first question in the defendants' favour, and the second in the plaintiff's favour. The affidavit further stated that it was most distinctly understood by both parties, when the arbitrator pronounced his decision, that the same was a final decision on his part as regards the said questions. There was no affidavit in answer to this affidavit of the plaintiff's solicitor. The arbitration having been further adjourned, the defendant Bendall applied to the Queen's Bench Division for leave to revoke the submission on the grounds that the arbitrator had wrongly held that the word "goodwill" in the agreement between the parties did not include the right to possession of the clients' papers as against the plaintiff; that he had rejected evidence on the question of the accepted meaning of "goodwill" in the profession on the transfer of a solicitor's business; that he had rejected evidence as to the intention of the parties when the agreement was entered upon; and that he had wrongly construed the agreement.

The Queen's Bench Division (Denman and Stephen, JJ.) refused the application.

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E. Tindal Atkinson, Q.C., and *T. Terrell*, for the defendant Bendall. The arbitrator's view is wrong in point of law, and *East and West India Docks Co.* v. *Kirk and Randall* (1) is an authority in favour of giving leave to revoke the submission in such a case. It will be said that that case was exceptional on account of the importance of the matters involved, but the matter here involved is one of the greatest importance to the appellant, for the whole question whether he is to derive any practical benefit from the transfer of the business depends upon it, and the point is one of general professional importance, and therefore one in which it is right that there should be an opportunity of reviewing the opinion of the arbitrator and settling the matter by submitting it to the Court. All that is really desired is that the arbitrator should be compelled to submit this point to the Court, as was done in *East and West India Docks Co.* v. *Kirk and Randall.* (1) [They also cited *Hart* v. *Duke* (2); *Robinson* v. *Davies.* (3)]

F. C. Gore, (*W. R. Davies*, with him), for the plaintiff. The understanding of the parties was that the arbitrator should finally decide the question of liability in the first instance, and that the decision he accordingly gave was a final one, and under those circumstances the Court will not after such decision give leave to revoke the submission to a party who having taken the chance of the decision is dissatisfied with it. [He was then stopped by the Court.]

Terrell in reply. (4)

LINDLEY, L.J. This is an appeal from the decision of the Divisional Court refusing leave to revoke the submission. I have no doubt that we have power to grant leave to revoke the submission, but I also have no doubt that it is a matter of discretion whether we should do so; and therefore the real question seems to me to be whether the facts of the particular case are

(1) 12 App. Cas. 738.
(2) 32 L. J. (Q.B.) 55.
(3) 5 Q. B. D. 26.
(4) The question whether the term "goodwill" as applied to a solicitor's business included the right of possession of the clients' papers was argued and authorities cited, but that part of the argument is not reported, because the Court expressed no opinion on that point.

such as to render it right for us, in the exercise of that discretion, to grant such leave. I do not understand the case of *East and West India Docks Co.* v. *Kirk & Randall* (1) as laying down any general rule opposed to what had been the ordinary practice previously. That case being one of a very exceptional character, the House of Lords took the view that it was expedient and right under the circumstances of that particular case to compel the arbitrator to state a special case with regard to the purposes for which he had received, and the effect which he had given to, certain classes of evidence as to matters involving enormous expense. It was a question of discretion: this Court did not think the circumstances of the particular case such as to render it right to interfere; the House of Lords differed from that view; but I do not think they intended to lay down any general principle on the subject. In this case there is one point which seems to me fatal to this application. The facts are these. The action was brought by the executrix of a solicitor deceased against two persons who were partners as solicitors. An agreement for the transfer of the business of the deceased to the defendants had been entered into between the plaintiff and the defendants, and a question was raised as to the true construction of that agreement in addition to the question what would be included in the term "goodwill." The parties agreed to refer all matters in difference to arbitration, and it was made a term of the submission that the arbitrator might decide the question of liability first. The parties came before the arbitrator and asked him to decide the question of liability first. He was not asked then to state a special case, but to decide the question of liability. He did decide it, and then the party against whom he decided it comes and asks to be allowed to revoke the submission. The question is whether it is right that he should be allowed to take that course, after inducing the arbitrator to do what in the ordinary course he would not have done, viz., to decide the case piecemeal. It seems to me that to take that course is really not quite consistent with good faith. Under these circumstances I do not think that this is a case in which leave should be given to revoke the submission. I express no opinion on the question as to the true construction of

(1) 12 App. Cas. 738.

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the agreement. I decide the case on the ground that under the circumstances we ought not in the exercise of our discretion to interfere.

LOPES, L.J. I agree. I wish to speak with all respect of the decision in *East and West India Docks Co.* v. *Kirk & Randall* (1), but I must say that I should think that decision matter of regret if it were to be regarded as laying down a general rule, because I think it would in that case do away with a great deal of the good arising from references to arbitration. What that decision comes to, however, appears to me to be this: the Court has, no doubt, power to give leave to revoke the submission when there is reason to believe the arbitrator is going wrong in law, even when it is on a matter within his jurisdiction; but it seems to me clear from the decision that the power is a discretionary power, to be exercised according to the circumstances of each particular case. Apart from the affidavit which has been read by the counsel for the plaintiff, I should have had great doubt in this case whether we ought to have exercised our discretion in favour of the appellant. But having heard that affidavit, I come to the conclusion without any doubt that the effect of what passed was that it was understood by all parties that the arbitrator's decision was a final decision on this question as to the meaning of the word "goodwill." And that being so, I have no doubt that we ought not now to give leave to revoke the submission. I express no opinion as to the question what is included in the term "goodwill." That question was decided by the arbitrator, and I do not see that any grounds have been shewn for interfering with his decision. I therefore think that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Peacock & Goddard, for Eaton, Evans, & Williams.*

Solicitors for defendant Bendall: *Bridges, Sawtell, & Co., for T. P. Bendall.*

(1) 12 App. Cas. 738.

E. L.

[IN THE COURT OF APPEAL.]

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May 2.

SADLER *v.* THE SOUTH STAFFORDSHIRE AND BIRMINGHAM DISTRICT STEAM TRAMWAYS COMPANY.

Tramway Company—Statutory Powers—Running Powers over Line of other Company—Tramway in defective Condition—Highway—Trespass.

The defendants were a company authorized by Act of Parliament to run tramcars by steam, and had running powers over the line of another tramway company along a highway. By reason of certain points upon such line being defective, a tramcar of the defendants, while being drawn by a steam-engine, went off the line and injured the plaintiff, who was upon the highway:—

Held, that the statutory powers of the defendants could not be taken to authorize them to run their tramcars along the highway upon a tramway in a defective condition: that, the tramway being defective, the defendants in running their tramcar on the highway were doing an unlawful act: and therefore that the defendants were liable as for a trespass in respect of the injury occasioned to the plaintiff by their immediate action.

APPEAL from the judgment of Charles, J., at the trial.

The action was brought in respect of personal injuries to the plaintiff and to recover damages under Lord Campbell's Act in respect of the death of the plaintiff's wife. The facts were in substance as follows. The defendants were a steam tramway company constituted under an Act of Parliament, and had running powers over a portion of the line of another company, called the Dudley and Stourbridge Tramway Company, which ran along a public highway. There were facing points at a place where the defendants' line joined the Dudley and Stourbridge Tramway Company's line for the purpose of enabling the tramcars to pass from one set of rails to another. A tramcar of the defendants, drawn by a locomotive steam-engine, having occasion to pass from one set of rails to the other, the defendants' conductor adjusted the points for that purpose and the engine passed safely over the points, but the tramcar went off the line on to the road and was thrown against the plaintiff and his wife who were standing on the highway, injuring the former and causing the death of the latter. The plaintiff endeavoured to shew that the speed at which the tramcar was being driven was excessive, and that there was negligence in the management of the car and points by the defendants. The defendants' case was that the accident

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arose from a defect in the points, and that, those points belonging to the Dudley and Stourbridge Tramway Company, they were not responsible for the consequences of such defect. The defendants' evidence was to the effect that the points were defective in the following respect. One of the points had a moveable tongue which was worked by hand, and there was no provision for fixing it while the cars passed. The point was loose at the heel, i.e. the place where the moveable tongue hinged, which made the point likely to "kick," i.e. to open during the passage of cars, and it was suggested in evidence at the trial that on the occasion in question the point had "kicked," and the car not following the engine on to the other line had in consequence been dragged off the line. It was admitted that since the accident the defendants had always wedged the point with a chisel or other piece of metal to keep it in position while the cars passed.

It appeared at the trial that these points were on the line of the Dudley and Stourbridge Tramway Company, but there was considerable controversy on the questions whether they belonged to that company or the defendants, and whose duty it was to keep them in order and repair them. It appeared that the Dudley and Stourbridge Company had on one occasion repaired them at the request of the defendants; and the defendants contended that the duty to repair them rested with that company. The learned judge, however, held that, assuming these matters in favour of the defendants, the defendants were using dangerous plant on a highway, and were responsible for the consequences thereby occasioned to the plaintiff and his wife; and he left to the jury these questions: (1) Was the accident caused by excessive speed; (2) or was it caused by negligent management of the points by the defendants' servants; (3) or was it caused by both those causes; (4) were the points themselves defective; (5) did the defendants know that they were so? The jury answered the the fourth question in the affirmative, but the others in the negative. On these findings the judge entered judgment for the plaintiff for damages assessed by the jury.

R. Kettle, for the defendants. The jury have not found any negligence on the part of the defendants. They were simply

doing what they were authorized by statute to do, viz., running their cars on the other company's tramway. It must now be taken that the points belonged to that other company and it would be the duty of the company to whom the points belonged to repair them. The cases where railway companies have been held responsible for accidents arising through defects or mismanagement on the lines of other railway companies over which they had running powers, and such like cases, all turn on the existence of a contract to carry safely: *Thomas* v. *Rhymney Ry. Co.* (1); *John* v. *Bacon.* (2) Here the plaintiff was merely a member of the public on the highway, and the defendants, being authorized to run along the highway on the other company's line, were no more responsible for the consequences of a defect in the other company's line, of which they were not aware, than a man driving his carriage along a highway would be responsible if through a defect in the highway the carriage were overturned and injured some person passing by. There is no negligence found, and the accident did not happen through the act of the defendants, the tramcar at the time when the accident happened being beyond their control through the defect in the line of the other company. So that really the case so far as they are concerned is one of inevitable accident, like *Holmes* v. *Mather* (3).

[He also cited *Gibbons* v. *Pepper* (4); *Wakeman* v. *Robinson.* (5)]

H. D. Greene, Q.C., and *Shakespeare*, for the plaintiff. It is not a question of negligence. The defendants are liable as for a trespass. The defendants were not using the highway in the ordinary manner: they were putting it to a special and extraordinary use which at common law they would not be justified in doing. The defendants were, no doubt, authorized by statute to run their trams on the tramway over the highway if their tackle was in proper condition. But the statute cannot be taken to authorize them to use their tramcars unless their tackle is in proper condition, and they cannot otherwise justify running on the highway. It is of no avail for them to say that part of the tackle belonged to another company. They were using it, and, if not

(1) Law Rep. 6 Q. B. 266.
(2) Law Rep. 5 C. P. 437.
(3) Law Rep. 10 Ex. 261.
(4) 1 Ld. Raym. 38.
(5) 1 Bing. 213.

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authorized to do what they have done, they were doing a dangerous and unlawful thing on the highway, and were guilty of a direct trespass in running their car against the plaintiff and his wife. The tramcar went where it did in consequence of the impulse immediately applied to it by their act, though it went in a different direction from what they intended: *Leame* v. *Bray* (1). There can be no question of inevitable accident in such a case as this. The jury have found that the defendants did not know of the defect in the points, but they were bound to satisfy themselves, before running their cars, that the line was in proper condition. It was not suggested that the defect could not have been found out, if they had properly inspected the line.

[They cited *Cotterill* v. *Starkey* (2); *Dickenson* v. *Watson* (3); *Vaughan* v. *Taff Vale Ry. Co.* (4); *Jones* v. *Festiniog Ry. Co.* (5).]

Kettle, in reply. The line on which the defect existed was not in the defendants' control.

[LORD ESHER, M.R. If the defendants had known of the defect and had never asked the other company to repair it, but had run their tramcars all the same, would they not have been liable? It is found that they did not know of it, but it must be taken that they could have found it out. They might have sent their servants along the tramway to examine the points.]

It is contended that there was no trespass, because the tramcar was out of the defendants' control when it came in contact with the plaintiff, through a defect in the points for which the defendants were not responsible; and there is no finding of negligence.

LORD ESHER, M.R. In this case what happened to the plaintiff and his wife appears to me to have happened in consequence of the defendants' immediate action; nothing intervened between their act and the accident. The question is whether they are liable for the accident. The defendants are a tramway company and are no doubt empowered by Act of Parliament to run their tramcars on the highway. It is impossible to say that to run

(1) 3 East, 593.
(2) 8 C. & P. 691.
(3) Sir Thomas Jones, 205.
(4) 5 H. & N. 679.
(5) Law Rep. 3 Q. B. 733.

such cars on the highway, unless the cars and the tramway are in proper condition, is not a dangerous thing. When the Act empowers the company for their own benefit to run these tramcars on the highway, it assumes, I think, that it will be the duty of the company to see that the cars and the tramway and all necessary apparatus are kept in proper condition for this purpose. If they fail to do so and the cars or the tramway be in an improper condition, then I think that, in running their cars on the tramway, they would be doing what they are not authorized to do by the Act: and I do not see how they could justify what they did on the highway unless they could say that they were doing what their Act authorized them to do. In this case the accident happened by reason of a defect not in the defendants' carriage but in the tramway which the defendants by their servants were using. It was said that the defendants had an arrangement with another company to which that tramway belonged by which they had running powers over it, and that the liability to repair that tramway rested on the other company, and the defendants were not liable to keep it in order. As between them and the other company that may be so, but the question here is between them and the public. They were only authorized to be on the highway at all by the Act: and as regards the public they could only justify using this tramway if they were doing what the Act allowed them to do. As I have said, I think that they were doing what the Act did not allow them to do. That being so, and the accident being the result of their immediate action, they are, as it seems to me, liable in trespass in respect of its consequences. They were doing a dangerous thing on the highway by running their steam tramcars, which they were authorized to run on a tramway in proper condition, upon a tramway which was not in a proper condition, and in so doing I think they were doing what was not authorized by the Act and what was therefore an unlawful act as against the public. Then if so, what answer have they? If they could shew that what happened was the result of inevitable accident, it might be said that it was not really the result of their action at all. It seems to me impossible to say that this was a case of inevitable accident. In this case the accident was not caused by something

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external happening over which the defendants had no control. They might have inspected the line and these points and seen the state of them. I cannot see any ground for saying that what happened was the result of inevitable accident. What would be a case of inevitable accident? Suppose, all the apparatus being in proper order, some miscreant had placed a log across the line unobserved, and in consequence the carriages had run off the rails and injured somebody. Possibly a case of that sort might be one of inevitable accident in which the company might not be responsible, although the injury was caused by their acts. Such a case might be like *Holmes* v. *Mather* (1). In that case the horses were not vicious, and the carriage was not out of order, but the barking of a dog frightened the horses. Something over which the defendant had no control caused the horses to run away. The judges in giving judgment in that case said in effect that what caused the accident was the act of the horses in running away, which was occasioned by something over which the defendant had no control; that the horses were running away and neither the defendant nor his servant was really driving them. The present case is not at all analogous to that case. For here the thing which the defendants were using was out of order. The case not being governed by *Holmes* v. *Mather* (1), for the reasons I have given I think the defendants have no answer to an action of trespass to the person. What they did was a wrongful act because they were doing a dangerous thing on a highway which they were not authorized to do; and it does not under the circumstances seem to me to have been necessary to leave any question to the jury as to negligence on their part. I think the judge below was right, and this appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion. To understand this case and the view taken of it by Charles, J., it is necessary to bear in mind what the facts were with regard to these points. The accident arose from the defective state of certain points. These points were upon a highway and were used by the defendants, and by the defendants only, though they were on the line of

(1) Law Rep. 10 Ex. 261.

another company. It would appear that the other company repaired them when required by the defendants, but the defendants had for the purpose of running their trams the use and control of these points; and it was because the defendants did not fulfil their duty to see that these points were in order before using them, and used them when out of order, that the accident happened. There can be no question of any inevitable accident in such a case. It was argued that the defendants were not responsible, and I quite agree that to sustain the action for damages against the defendants it must be shewn that they were guilty of an unlawful action; and, unless some wrongful act on their part can be shewn, they are not liable; but it seems to me that, for the reasons already given, the wrongful act on their part is patent. Under these circumstances I think Charles, J., was right in thinking that there was no question of negligence, and that the defendants were liable because they were guilty of a wrongful act.

LOPES, L.J. It was the immediate act of the defendants which occasioned the injury to the plaintiff and the death of his wife. There was, therefore, undoubtedly, primâ facie a trespass to the person. The only question is, whether the defendants had any legal justification or excuse for what they did. If the defendants had been able to shew that they were not to blame, and that what happened was the result of inevitable accident, different questions would have arisen as to which I express no opinion. What was the position of the plaintiff and his wife, and of the defendants respectively? The plaintiff and his wife were legally using the highway as they were entitled to do. The defendants were a company authorized to use certain dangerous machinery on the highway. It seems to me that that authority was to use such machinery in proper condition, not to use it in an improper and defective condition. The jury have found that the points were defective: the defendants therefore were using the machinery, which they were authorized to use in a proper condition, while it was in a defective and improper condition. The jury it is true found that they did not know that it was in a defective condition; but nevertheless they used it in such condition, and by such use of

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it the plaintiff and his wife were injured. I think under these circumstances the defendants were guilty of a tortious act towards the plaintiff and were liable for the consequences in trespass. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *W. Shakespeare.*

Solicitors for defendants: *Stokes & Hooper.*

E. L.

May 7.

ELLIS & CO., APPELLANTS; HULSE, RESPONDENT.

Highway — Locomotive — Licence — Exemption — "Locomotive used solely for agricultural purposes"—Highways and Locomotives (Amendment) Act, 1878, (41 & 42 *Vict. c.* 77), *s.* 32.

A locomotive which is sometimes let out by its owner to farmers for the purpose of carrying straw and manure for use in farming operations, and which is sometimes used by the owner himself for the purpose of carrying for hire straw and manure to be used exclusively on farms, and is not used for any other purpose, is within the exemption in s. 32 of the Highways and Locomotives (Amendment) Act, 1878, as being "a locomotive used solely for agricultural purposes," and may be so used without a licence from the county authority.

CASE stated by justices of Kent.

An information was preferred by the respondent against the appellants charging that they, being the owners of a locomotive for which a licence was required under a certain bye-law made at quarter sessions under s. 32 of the Highways and Locomotives (Amendment) Act, 1878 (1), and duly confirmed by the Local Government Board, unlawfully and in contravention of such bye-law permitted such locomotive to be used upon a certain highway without having a licence to use the same.

(1) By the Highways and Locomotive (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 32, "A county authority may from time to time make, alter, and repeal bye-laws for granting annual licences to locomotives used within their county, and the fee (not exceeding ten pounds) to be paid in respect of each licence; and the owner of any locomotive for which a licence is required under any bye-law so made who uses or permits the same to be used in contravention of any such bye-law shall be liable to a fine not exceeding forty shillings for every day on which the same is so used."

* * *

"This section shall not apply to any locomotive used solely for agricultural purposes."

The bye-law made in pursuance of this section was as follows:—"No locomotive except it be one used solely for agricultural purposes shall be used on any highway within the jurisdiction of the county authority, the owner of which has not obtained a licence for the use of the same within such jurisdiction."

Prior to October 16, 1888, the appellants had contracted with Lord Falmouth to carry about one thousand tons of manure from a wharf to a farm belonging to Lord Falmouth about four or five miles distant upon the terms that the appellants were to be paid a fixed price per ton for the carriage.

On October 16, 1888, part of the manure was carried by the appellants to the said farm in three trucks drawn by a locomotive belonging to the appellants, and in doing so the locomotive was used on a highway within the jurisdiction of the county authority within the meaning of the bye-law, and the appellants then used or permitted it to be used on the highway, they not having then obtained a licence for its use within the jurisdiction

The manure was intended by Lord Falmouth's steward to be spread upon the farm for the purpose of manuring the land, and it was proved that carriage by locomotive of manure, straw and other agricultural produce was nearly one half cheaper than carriage by horse labour.

The locomotive was of a different character to the ordinary road engine; it was lighter, and not fit for such heavy work; but it could be used for other than agricultural purposes. The appellants got their living by letting engines for hire, including the one in question, and owned twenty engines similar to it, all of which were used for similar purposes and were unlicensed, and three heavy road engines which were licensed. They were in the habit of letting out the engine in question at fixed prices for the purpose of being used by farmers in threshing and carrying straw and manure, and also were in the habit of using it for carrying straw and manure for third persons to be used on farms exclusively, but the engine was not used in any other manner or for any other purpose. It was contended on the part of the respondent that under the circumstances the appellants had acted in violation of s. 32 of the Highways and Locomotives (Amendment) Act, 1878, and on the part of the appellants that the locomotive

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in question came within the exception contained in the section as being used solely for agricultural purposes within the meaning of the section.

The justices convicted the appellants and imposed a fine. The question for the Court was whether the decision of the justices was right in point of law.

H. F. Dickens, for the appellants. This locomotive was being used solely for agricultural purposes within the meaning of the proviso, which was intended for the benefit of people engaged in agricultural pursuits; the section could not have been intended to protect only wealthy farmers who could afford to keep an engine for their own sole use, and not those farmers who had to hire an engine from the owner. In an analogous case with regard to turnpike toll it has been held that a wagon of the seller conveying artificial manure to the farm of the purchaser was within the exemption from toll, as being "a carriage employed in conveying manure for land:" *Foster* v. *Tucker* (1); *Reg.* v. *Freke.* (2) It is immaterial that the person who owns the engine on a particular day makes money out of it; the question is, what is the purpose for which the engine is used.

F. M. White, Q.C., and *Gore*, for the respondent. The engine was primarily used for the purpose of being let for hire and bringing in profit to its owner, and not for agricultural purposes.

FIELD, J. I am of opinion that this appeal should be allowed. The appellant was convicted and fined for having used a locomotive on a county highway without having taken out a licence for the purpose. No doubt the Act of Parliament says that in certain cases a man shall be liable to a fine if he uses a locomotive engine on the highway without a licence. But there are engines and engines: some adapted for the traction of heavy goods, and lighter ones adapted rather for agricultural operations, such as threshing, and carrying materials for use on the farm. It is found in this case that the engine was as a fact used for an agricultural purpose; the engine was different from an ordinary road engine, but could be, though it was not, used for other than

(1) Law Rep. 5 Q. B. 224. (2) 5 E. & B. 944.

agricultural purposes. The appellant had twenty of such engines which were used for similar purposes to the one in question, which was let out by the appellants to farmers for the purpose of carrying straw, manure and other materials necessary in farming operations, and which was also at times used by the appellants themselves for the purpose of carrying straw, &c., to be used exclusively on farms. Although this machine was capable of being used for other than agricultural purposes it was not so used, unless we can import into the word "purpose" the consideration or motives operating in the mind of the person using it. All the operations for which it was used were agricultural purposes; but it is said that the purposes ceased to be agricultural, because superadded to the final end for which it was used, that of carrying manures five miles to the farm, was the fact that it was done by the owner for purposes of gain. But that is not the reason why the engine was used; it is the reason why the appellants bought it, the very sufficient reason that they might make an income out of it. It therefore falls within the ordinary meaning of the exemption, and cannot be taken out of it by reason of the motives of the appellants; the language of the section will not support such a contention. It must not be forgotten that this exemption of engines used for agricultural purposes only was intended as a boon to agriculture, and has been long enjoyed, and was intended to be continued by this Act of Parliament. If a 10*l.* licence were necessary in such a case it would ultimately come out of the pocket of the farmer, and the object of the Act would be defeated.

CAVE, J. I am of the same opinion. It is admitted that if the engine is owned and used by the farmer it is within the exemption in s. 32 of the Act of 1878; but it is contended that the present case is not within that exemption, because the engine was let out for hire by the owners, who speculated in these engines. But that is not the test which is to be applied to the construction of the words of the exemption; the meaning of the word "purpose" is the purpose to which the machine itself is put. The distinction between the agriculturist, who gets exemption, and other persons, such as quarrymen, who do not get it, is a simple one;

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for the one uses the roads for the carriage of much heavier goods than the other. But, if we are to say that the word "purpose" refers to the motives in the mind of the proprietor, we at once complicate matters by introducing a cross distinction. It is said that these appellants let out the engine for the purpose of obtaining money for its hire, and that therefore it was used for other than agricultural purposes. But suppose that a large landowner had such an engine, and let his tenants use it; it might be said that he allowed it to be used for other than agricultural purposes, for instance, for benevolent purposes, or for the purpose of securing goodwill with a possible view to benefiting by it himself in the future. Such an example shews the meaning which might be put on the exemption, if we interpreted the word "purpose" in any other way than we have done.

Our decision may be based on another ground. The very object of this exemption is the well-known one of favouring agriculture, an old object of English legislation in favour of a very important industry. If the respondent's view of this section is correct the exemption from licence duty would only arise where the farmer was sufficiently wealthy to keep an engine for himself, while encouragement is far more necessary in the case of the small farmer than of the wealthy one; and the effect of the section would be to tax the poor man and exempt the wealthy, a result which it is absurd to suppose that the legislature could have contemplated.

Appeal allowed.

Solicitors for appellants: *Sole, Turner & Knight, for Cripps & Sons, Tunbridge Wells.*

Solicitors for the respondent: *Palmer & Bull, for Brennan, Maidstone.*

W. J. B.

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April 12.

Municipal Corporation—Election Petition—Trial—Corrupt and Illegal Practices—Appearance by Solicitor—Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 *Vict. c.* 51), *s.* 38—*Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 23, *Sched. III., Part II.*

By s. 38 of the Corrupt and Illegal Practices Prevention Act, 1883 (which applies to municipal election petitions), before a person, not being a party to an election petition, nor a candidate on behalf of whom the seat is claimed, is reported by an election Court to have been guilty of any corrupt or illegal practice, the Court shall cause notice to be given to him, and if he appears, "shall give him an opportunity of being heard by himself, and of calling evidence in his defence to shew why he should not be so reported":—

Held, that this section excluded the right of a person charged with any corrupt or illegal practice at a municipal election to be heard by his counsel or solicitor.

RULE, obtained on behalf of T. W. Garrold, a solicitor, calling upon H. R. Mansel Jones, Esq., the commissioner assigned to try an election petition presented against the return of two persons as members of the town council for a ward of the municipal borough of Hereford, to shew cause why a writ of mandamus should not issue to compel him to give audience to Garrold during the hearing of the petition.

It appeared from affidavits filed on behalf of the applicant for a mandamus that during the hearing of the election petition one Giles, not being one of the parties to the petition, nor a candidate on behalf of whom the seat was claimed, was served with notice under s. 38, sub-s. 1, of the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51) (1), that he was liable to be

(1) By the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), so much of s. 38 of the Corrupt and Illegal Practices Prevention Act, 1883, as is set forth in Part II. of the third Schedule of this Act, shall apply as part of this Act.

Sect. 38, sub-s. 1, is set forth in Part II. of Sched. III. as follows:—"Before a person, not being a party to an election petition, nor a candidate on whose behalf the seat is claimed by an election petition, is reported by an election Court to have been guilty, at an election, of any corrupt or illegal practice, the Court shall cause notice to be given to such person, and if he appears in pursuance of the notice, shall give him an opportunity of being heard by himself, and of calling evidence in his defence to shew why he should not be so reported."

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reported for bribery. Giles retained the applicant as his solicitor, who instructed counsel to appear before the commissioner. Counsel accordingly appeared for several days during the hearing of the petition; and subsequently the applicant, having ceased to instruct counsel, appeared himself before the commissioner as advocate for Giles, and claimed to cross-examine the witnesses against him. The commissioner refused to give audience to the applicant, on the ground that counsel had exclusive right of audience in the Court.

The further hearing of the petition was adjourned, and this rule was obtained, the Divisional Court directing that notice of the rule should be given to the Attorney-General and to the President of the Incorporated Law Society.

R. S. Wright, (*Sir Richard Webster, A.G.*, with him), for the Bar, shewed cause against the rule. As to the construction of so much of s. 38, sub-s. 1, of the Act of 1883, as is transferred to the Act of 1884, the words, "shall give him an opportunity of being heard by himself, and of calling evidence in his defence to shew why he should not be reported," do not exclude the right of the person charged with a corrupt or illegal practice to be heard by counsel. Those words have received an interpretation by the learned judges who tried the Ipswich election petition in 1886. In that case a person, not being a party to the petition, nor a candidate on whose behalf the seat was claimed, was charged with bribery, and appeared by counsel before the commission. It was objected on behalf of the Public Prosecutor that the words of s. 38, sub-s. 1, precluded him from being heard by counsel. The Court (Denman and Cave, JJ.) overruled the objection and allowed counsel to appear. Denman, J., said: "I think there is a way of reading them, and a fair way, by supposing they draw a contrast between the person being heard by himself and witnesses being heard, and the usual incidents of a right to counsel follow." Cave, J., said: "Does not 'by himself' mean that he may appear by himself or by counsel, in contradistinction to being heard simply. A man may be reported guilty of corrupt or illegal practices; illegal practices are for the most part new, and it may be that a question of law may

arise which the man himself is quite unable to argue." The learned judge also pointed out that the intention was to allow a man, who had been heard as a witness—his interest then being subordinated to that of the party who called him or against whom he was called—to appear in a different position so as to take care of his own interests, and said: "I do not think there is anything that requires that he must himself do all this. It is contrary to the general practice, because the rule of law is that every person shall have the right to be heard by counsel." (1)

Lewis Coward, for the petitioner, also shewed cause.

Finlay, Q.C. (*Hollams*, with him), for the Incorporated Law Society, and *Gwynne James*, for the applicant, supported the rule.

[As the decision of the Court turned wholly on the construction of the words "by himself," in s. 38 of the Corrupt and Illegal Practices Prevention Act, 1883, it is thought unnecessary to state in this report the arguments, and authorities cited, as to the respective rights of barristers and solicitors to appear before Courts constituted to try election petitions, and as to the discretion which commissioners are entitled to exercise in respect of allowing or refusing them audience.]

LORD COLERIDGE, C.J. In this case it is desired to raise a question of much importance as to the relation of the two branches of the profession with respect to practising in court at the hearing of election petitions. I do not think that question arises in the present case. We have here to do with a tribunal created by very recent legislation—so recent, indeed, that no sanction at law can be given by mere custom to any alleged right of solicitors to practise before it. I think that the question whether the commissioner was right in refusing to hear the applicant must be decided with reference to the statute alone. It is the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and no binding practice can have arisen under it during the four years which have elapsed since the Act was passed. A commissioner appointed to try municipal election

(1) The learned judges' ruling was quoted from a newspaper report of the proceedings at the trial of the Ipswich petition, the substantial accuracy of the report being vouched by one of the counsel engaged in the case.

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petitions must be a barrister of considerable standing, and he must be appointed by the election judges for the year. It is obvious, therefore, that he is to be presumed to be a competent and experienced person. In the present case, during the hearing of the petition, a person, not being a party to the petition, nor a candidate on behalf of whom the seat was claimed, was accused of bribery before the commissioner; and there is no doubt that under the procedure of the Act, as under the procedure of the Act of 1883 with respect to corrupt practices at parliamentary elections, very serious consequences might result to a person reported to have been guilty of bribery. But the Act provides —and it is no more than common justice—that, wherever a person is or may be so affected by the judgment which the commissioner is empowered to pass, he is entitled to be heard before the judgment is given. The Act provides that notice must be given to him, and if he appears in pursuance of the notice, the Court shall give him an opportunity of being heard "by himself," and of calling evidence in his defence to shew why he should not be reported. Now what do those words, "by himself," mean? The learned commissioner has interpreted them as though they meant that the person might be heard by himself or by his counsel, but in no case by his solicitor. A great deal was said in argument—and with great force if the matter were one for legislation and not for interpretation of the statute—with respect to the hardship of preventing a person appearing by his solicitor. But such considerations cannot make the law of parliament to mean something different to that which it has said. There may be good reasons for limiting the right of appearance in such cases. As I have often said in this court, I prefer that mode of construing a statute by which you look at the words used, and, if they are plain, give effect to them, to the mode of construction by which you first satisfy yourself what Parliament ought to have meant, and then interpret the statute by saying that it has so said. Here the Act has said as plainly as possible that the person shall be heard "by himself." I am of opinion that those words exclude him from being heard either by counsel or solicitor. That view is strengthened by considering the provisions of the Act of 1883, which deals with the prevention of corrupt

and illegal practices at parliamentary elections. The words we have to construe are in s. 38, sub-s. 1, of that Act, and are transferred to the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. With great deference to the opinion of the judges who tried the Ipswich election petition, I doubt whether there is any reason for construing the words "by himself," occurring in the Act of 1883, with any greater laxity than I construe them in the Act of 1884. The Act of 1883 expressly gives a person reported by election commissioners a right of appeal to the next Court of oyer and terminer or gaol delivery held for the county or place in which the offence is alleged to have been committed. Where summary proceedings are taken, the person accused may appear in any way he pleases. It seems to me tolerably clear that, in the case of parliamentary election petitions, the proceeding before the commissioners is merely initiatory to doing something further, and that the legislature meant in the Act of 1883 what it has said, namely, that the person accused, and the person accused only, shall be heard on such a proceeding. Parliament must be taken to have had in view the extreme inconvenience, in the initiatory process of determining whether three or four hundred people should be scheduled, of hearing counsel or solicitor for each person. Now, if it once be granted that in the Act of 1883 the words "by himself" mean by himself and by no one else, it would be an absurdity to construe the same words differently in the Act of 1884. If the words mean "by himself and no one else" in s. 38 sub-s. 1, of the Act of 1883, then it must be remembered that the legislature has taken the very same words and applied them to municipal elections by the Act of 1884. Substantially s. 38, sub-s. 1, is transferred bodily to the later Act. It would be monstrous, under those circumstances, to hold that the words meant something different in the Act of 1884 to what they meant in the Act of 1883. It is not, in my opinion, necessary in this case to decide what may be the inherent right of courts of inferior jurisdiction, or what discretion they may be entitled to exercise, in respect to giving audience to counsel or solicitors. Our decision turns wholly on the effect of the very few material words in the Act of 1884. I do not think that the provision, in

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s. 28 of the Act of 1884, enabling the Public Prosecutor to appear "by himself or his assistant," bears upon the point at all.

I am of opinion, therefore, that this rule ought to be discharged on the ground that the learned commissioner was right in refusing to hear the solicitor who now applies for a mandamus, though his refusal was based on wrong grounds. I think that, having regard to the plain and express words of the Act, the commissioner had no discretion to exercise.

POLLOCK, B. I am of the same opinion. I assent to the propositions stated by the Lord Chief Justice. I was at first unwilling to give such an effect to the language of the Act of 1884 as would prevent a person charged with having committed corrupt practices from appearing to defend himself by solicitor or counsel. It must be remembered, however, that the Court for the trial of municipal election petitions is a Court newly constituted by Act of Parliament. The person charged is not a party to any issue before the Court, and whether or not he has committed corrupt practices must be determined upon the evidence of other persons who must have been closely connected with his conduct. It must first be established by the evidence of others that he is a person against whom the charge is made. Then there comes a moment of time at which the commissioner has to determine whether or not to make a report against him. He is summoned before the Court; and, if he appears, the Court must give him an opportunity of being heard "by himself." Those words may be struck out entirely if the view is adopted that he may be heard by counsel or solicitor. I think they mean "by himself" and nothing else. No great danger results from that construction. He is only in the position of a man against whom a bill has been found by a grand jury. He is entitled to insist that other proceedings shall be taken against him before he is made liable to the consequences which may follow if he is found to have been guilty of corrupt practices.

HAWKINS, J. I am of the same opinion. I thoroughly agree with the judgment pronounced by the Lord Chief Justice. If it were not intended to limit the right of appearance to the person

accused of corrupt practices, and to him only, I cannot see why the words "by himself" were introduced into the Act at all. It is a common form of expression to say that a man shall be heard "by himself, or his counsel, or solicitor." I am of opinion that the words "by himself" standing alone mean that he alone shall be heard. I therefore think that the commissioner was wrong in allowing counsel to appear. He had no discretion to allow anybody to appear on Giles' behalf. The rule must be discharged.

Rule discharged.

Solicitors for the Bar: *Hare & Co.*
Solicitors for petitioners: *Merediths, Roberts & Mills.*
Solicitor for the Incorporated Law Society: *E. W. Williamson.*
Solicitors for applicant: *T. White & Sons.*

W. A.

FLEETWOOD *v.* HULL AND ANOTHER.

April 15.

Landlord and Tenant—Covenant running with Land—Action by Assignee of Reversion—Lease of Public-house—Covenant to conduct Business in such manner as to afford no Ground or Pretext whereby Public-house Licences might be or be in danger of being suspended, discontinued, or forfeited—Conviction of Tenant—No Indorsement on Licence—Forfeiture—Licensing Acts, 1872 *and* 1874 (35 *&* 36 *Vict. c.* 94, *and* 37 *&* 38 *Vict. c.* 49).

In the lease of a public-house the lessee covenanted that he would "conduct and manage the business of an inn, tavern, or beerhouse keeper in such proper and orderly manner as to afford no ground or pretext whatever whereby the licence or licences should or might be suspended, discontinued, forfeited, or be in any danger of being suspended, discontinued, or forfeited." The lease contained a clause of re-entry for breach of covenant. A person who occupied by leave of the lessee was convicted of selling drink within prohibited hours, but the conviction was not indorsed on the licence. The assignee of the reversion on the lease having brought an action to enforce the right of re-entry on the ground of a breach of covenant:—

Held, first, that the covenant ran with the land, and might be enforced by the assignee of the reversion; secondly, that in the circumstances there had been no breach of the covenant.

ACTION tried before Charles, J., without a jury, at the Liverpool Assizes, in March, 1888.

This was an action by the assignee of the reversion on a lease against the lessee to recover possession of a public-house on the ground of a forfeiture for breach of covenant, and for damages.

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The facts and arguments sufficiently appear from the judgment.

W. H. Butler, and *H. Shee*, for the plaintiff.

Joseph Walton, for the defendants.

Cur. adv. vult.

1889. April 15. CHARLES, J. The plaintiff in this action claims, as assignee of the reversion, to recover possession of a beerhouse and damages for breach of covenant, under the following circumstances:—

By a deed dated October 1, 1879, John and Elizabeth Miller let to the defendant James Hull a beerhouse situated in Freckleton Street, Kirkham, together with the licences attached thereto, and the fixtures and fittings therein, for a term of twenty-one years from May 1, 1879, at a yearly rent of 25*l.* per annum. The defendant Hull covenanted, amongst other things, that he would "keep the said premises open at all proper and legal hours, and conduct and manage the business of an inn, tavern, or beerhouse keeper in such proper and orderly manner as to afford no ground or pretext whatever whereby the licence or licences should or might be suspended, discontinued or forfeited, or be in any danger of being suspended, discontinued or forfeited." There was a proviso for re-entry in case of the breach, non-observance, or non-performance of any of the lessees' covenants. On March 7, 1888, the plaintiff bought the beerhouse of the lessors.

On October 22, 1888, one William Webster, who was in occupation of the premises by the defendant Hull's leave, was convicted before the justices of selling drink within prohibited hours on Sunday, September 16, 1888; and on October 23 the plaintiff gave a notice to the defendant Hull which, after reciting the terms of the lease and the assignment of the beerhouse, proceeded thus: "And whereas you have committed breaches of the covenants contained in the hereinbefore recited indenture of lease in the following respects, namely, ... (3) That one William Webster, the occupier of the said premises was on the 22nd instant convicted before the magistrates of selling drink during prohibited hours (namely, on September 16 last), and was fined 5*l.* and costs. Now I the undersigned Edward Fleetwood, in pursuance of s. 14 of the Conveyancing and Law of Property

Act, 1881, do hereby give you notice of the breaches hereinbefore complained of, and require you to remedy the same breaches so far as the same are capable of remedy, and to make compensation in money for such breaches."

After this notice was delivered the licence was transferred from Webster to the defendant Disley, who at the time this action was commenced was in occupation of the beerhouse.

Webster's conviction was not indorsed on the licence.

The plaintiff contended that the covenant above set forth had been broken by reason of the conviction of Webster, and that he was therefore entitled to possession under the proviso for re-entry and to damages. The defendants relied upon two grounds of defence: first, they insisted that the covenant which was alleged to have been broken did not run with the land, and that the assignee of the reversion could not sue; and secondly, that the conviction of Webster, not having been indorsed on the licence, was not a matter which involved either the suspension, discontinuation, or forfeiture of the licence, nor was it a matter which placed the licence in any danger of being suspended, discontinued, or forfeited. The first question, therefore, which I have to determine is, whether the covenant is one which runs with the land. Does it touch or concern the thing demised? Now the thing demised was a beerhouse, and, looking at the question apart from authority, I should be of opinion that the covenant does touch or concern the thing demised. And I find that the authorities point to the same conclusion. The covenant is concerned with the mode in which the premises are to be dealt with and used by the occupier, and appears to me to be analogous to a covenant to cultivate the lands demised in a particular manner, or to reside on the premises, or not to carry on a particular trade on them, all of which have been held to run with the land: *Cockson* v. *Cock* (1); *Tatem* v. *Chaplin* (2); *Mayor of Congleton* v. *Pattison.* (3) The case of *Thomas* v. *Hayward* (4), which was relied on for the defendants as shewing that such a covenant was collateral, is distinguishable. There the lessor of a beerhouse had covenanted with the lessee not to build or keep

(1) Cro. Jac. 125.
(2) 2 H. Bl. 133.
(3) 10 East, 130, at p. 136.
(4) Law Rep. 4 Ex. 311.

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Charles, J

any house for the sale of spirits or beer within half a mile of the demised premises, and it was held that this covenant did not run with the land. But that was upon the ground that the covenant was not either to do or refrain from doing anything on the demised premises. It did not touch the thing itself; it only restrained the lessor from setting up a beerhouse somewhere else. *Wilson* v. *Hart* (1) was also referred to. In that case the owner of land had covenanted with the plaintiff, a previous owner, that any house built or thereafter to be built on the land should not be used as a beershop. Assigns were not named in the covenant, and it seems to have been upon that ground that the Vice-Chancellor and the Court of Appeal expressed an opinion, though they did not actually decide, that the covenant did not run with the land. The only point actually decided was that, whether it ran with the land or not, it bound the defendant, a tenant of the purchaser, in equity, he having had notice of it. Having come to the conclusion, then, that this covenant runs with the land, it is secondly necessary to consider whether, Webster's conviction not having been indorsed on the licence, that was a matter which involved a breach of the covenant. It was said that this conviction placed the licence in danger of being suspended, discontinued, or forfeited; that although not indorsed on the licence, the mere fact of its existence would necessarily have a prejudicial effect. It was proved that the offence would be reported at the annual licensing sessions, and I was asked to infer that the justices in exercising their judicial discretion as to granting or refusing a renewal would certainly be influenced unfavourably by the fact that an offence had been committed against the Licensing Acts. But I cannot draw such an inference. The justices' discretion, though absolute, *Sharpe* v. *Wakefield* (2), is to be exercised judicially, and I am unable to say whether this conviction was obtained under circumstances which would on some future occasion influence the minds of the justices. If the conviction had been indorsed on the licence a question might have arisen whether the licence was or was not endangered. If two convictions had been indorsed then the licence would no

(1) 2 H. & M. 551, at p. 554; Law Rep. 1 Ch. 463.
(2) 21 Q. B. D. 66; 22 Q. B. D. 239.

doubt have been in danger, because a third conviction could, by s. 30 of the Licensing Act of 1872 (35 & 36 Vict. c. 94), forfeit the licence. But in the absence of any indorsed conviction I cannot see that the licence has been endangered. The contention of the plaintiff comes really to this, that the covenant is equivalent to a covenant that the lessee will not commit any offence against the Licensing Acts. The language of the covenant, which might easily have been so framed, does not in my opinion cover all such offences: and my opinion is confirmed by the decision on somewhat similar words of the Exchequer Division and Court of Appeal in *Wooler* v. *Knott.* (1) I do not think, therefore, that in this case any breach of covenant causing a forfeiture has been proved.

I may add that, had I come to a different conclusion, the case appears to be one in which the defendants would have been entitled to relief under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14. The licence has been transferred since the conviction; and in the hands of the present holder, no conviction having been indorsed upon it, remains, I think, entirely unaffected. My judgment accordingly is for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Charnley, Finch, & Johnson, Preston.*
Solicitors for defendants: *W. Banks & Co., Preston.*

(1) 1 Ex. D. 124, 265.

H. D. W.

1889
May 21.

IN RE PARFITT.

Bankruptcy—Small Bankruptcy—Solicitor's Bill of Costs—Taxation—Conveyancing Business—Bankruptcy Rules, 1886, *r.* 112, *sub-ss.* 1, 2—*Appendix (Scale of Costs), Parts I. and II.—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44).

Sub-s. 2 of rule 112 of the Bankruptcy Rules, 1886 (which reduces a solicitor's charges by two-fifths "in all proceedings under the Act in which costs are payable out of the estate" where the estimated assets do not exceed £300), does not apply to conveyancing business, and the charges in respect of such business are regulated by rule 2 of the General Regulations in the Appendix to those Rules.

APPLICATION to review the master's taxation of a solicitor's bill of costs.

It appeared that one John Parfitt was adjudicated bankrupt in the County Court at Pontypridd in Glamorganshire. His estate (chiefly leasehold) was sold by the trustees in bankruptcy and realized less than 300*l*. W. R. Davies was the solicitor employed by the trustee, and his bill of costs, which related entirely to conveyancing business, was taxed by the registrar of the county court under the General Order to the Solicitors' Remuneration Act, 1881, as directed by rule 2 of the General Regulations contained in Part II. of the Appendix to the Bankruptcy Rules, 1886. The Board of Trade objected to this taxation on the ground that the costs were costs of proceedings under the Bankruptcy Act, 1883, and the Bankruptcy Rules, 1886, and were payable out of the estate, and therefore that the reduced scale of costs prescribed by rule 112 (sub-s. 2) of the Bankruptcy Rules, 1886, applied. On application for a review of the taxation, pursuant to rule 124 of the Bankruptcy Rules, 1886, the Taxing Master affirmed the decision of the county court registrar on the ground that the costs in question were not costs of "proceedings under the Act," and being costs of conveyancing matters rule 112 (sub-s. 2) did not apply, the taxation being regulated by rule 2 of the General Regulations. The matter was then by consent referred to the judge for decision.

Muir Mackenzie, for the Board of Trade. Reading the two sub-sections of rule 112 together, they prescribe the scale of costs

generally in all proceedings under the Bankruptcy Act, 1883, in which the costs are payable out of the estate. The expression "proceedings under the Act" has a wide significance, and includes conveyancing business. It is not confined to proceedings in court, but extends to everything which the trustee has power to do and does under the provisions of the Act. For instance, s. 56 is his only authority for selling the property of the bankrupt. Then s. 72, sub-s. 4, gives him his expenses out of the estate, and s. 73, sub-s. 2, provides that his solicitor's bill of costs shall be taxed. Sect. 105 distinguishes between proceedings in court under the Act from proceedings under the Act. These costs are clearly payable out of the estate, and are in respect of conveyancing business done under the Act.

Ashton Cross, for the solicitor. The scale of costs in the Appendix only relates to contentious matters, and does not extend to conveyancing business. Rule 112 must be read with some limitation. By a "proceeding under the Act" is intended a legal proceeding in bankruptcy taken by a solicitor in such a way as that it can come under the review of this Court. Everything that a trustee does by virtue of his powers under the Act is not, strictly speaking, a proceeding under the Act, although his title may be based upon the Act. The General Order to the Solicitors' Remuneration Act, 1881, reduces (rule 8) the solicitor's remuneration from 5*l.* to 3*l.*, when the transaction is under 100*l.*, and, if the reduction prescribed by sub-s. 2 of rule 112 is to apply, it will be still further reduced from 3*l.* to 36*s.* If the legislature had intended such a sweeping reduction, it would have effected it by express words, and not by mere implication.

Muir Mackenzie, in reply.

CAVE, J. I am of opinion that the taxation in this case was right. The language of the Act is not as clear as it might be, but I think it is tolerably clear what was intended by these Rules and Regulations. The important one is rule 112, sub-s. 1, which says, "The scale of costs set forth in the Appendix, and the regulations contained in such scale, shall, subject to these Rules, apply to the taxation and allowance of costs and charges in all proceedings under the Act and these Rules." That scale of costs,

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therefore, is to apply to the taxation and allowance of costs and charges "in all proceedings under the Act." Now, the scale of costs which is given in the Appendix is certainly limited to "proceedings under the Act" in the narrower use of that expression. It is said that the regulations contained in the scale do also apply to proceedings which are not in the narrow sense "proceedings under the Act;" and so undoubtedly they do. But because the regulations apply in the case of costs of proceedings under the Act, it does not therefore follow that everything to which the regulations apply is costs in a proceeding under the Act. The fact is that you may have a scale of costs, and you may have regulations applying to proceedings under the Act, and yet there may be other regulations which apply to other proceedings or to other business which cannot be strictly called "proceedings under the Act." There is nothing impossible in that. Then you come to sub-s. 2 of rule 112, which says, "Subject to the provisions of No. 1 of the scale of costs, where the estimated assets of the debtor do not exceed the sum of 300*l.*, a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely, three-fifths of the charges." If you come to look at the scale, Part I. contains provisions for the solicitor's charges, and No. 1 contains certain allowances where the amount of assets is under 100*l.*, or does not exceed 100*l.*, then another scale where the amount exceeds 100*l.* but is under 200*l.*, and a third scale where the amount exceeds 200*l.* but does not exceed 300*l.* Therefore, inasmuch as No. 1 has already provided minutely for solicitors' costs, sub-s. 2 accepts the provisions of No. 1, or rather says, "Subject to the provisions of No. 1 in the scale of costs, where the estimated assets of the debtor do not exceed the sum of 300*l.*, a lower scale of costs shall be allowed in all proceedings under the Act where costs are payable out of the estate, namely, three-fifths of the charges." Then Nos. 2, 3, 4, 5, and 6 are the scales of costs in a proceeding under the Act. Now, inasmuch as it is obvious that there existed an intention to make a difference in the scale of costs according to the amount of assets which were likely to be realizable, there is nothing at all extraordinary in a general rule being passed which takes the scale of costs Nos. 2,

3, 4, 5, and 6, and cuts them down, so far as a solicitor is concerned, where the estimated assets are under 300*l.*, to three-fifths of the sum which is there charged. Then you come to the General Regulations, and Mr. Mackenzie's contention would have been stronger if the General Regulations had applied solely to costs of proceedings which could not be called "proceedings under the Act." But the General Regulations are not limited to the costs of proceedings which cannot be called "proceedings under the Act." For instance, No. 3 says: "All Court fees and other proper disbursements shall be allowed in addition to the remuneration in this scale provided." No. 4: "Extra allowance for length of sittings or other increased allowances not inconsistent with this scale." No. 5: "Vouchers shall be produced on taxation, &c." No. 6: "Bills of costs shall be written lengthwise," and so on. Therefore, there are a great number of regulations which undoubtedly do apply to what I have called "proceedings under the Act," taking that expression, as I think it must be taken, in the narrower sense of proceedings for which the scale of costs is provided in Nos. 2, 3, 4, 5, and 6. Then rule 2 of the General Regulations provides a scale with reference to conveyancing business—or rather it does not apply a scale at all with regard to that business, but says that with respect to that business the existing scale which has been already approved of by the legislature is to apply. Now, when the legislature were fixing a scale of costs for proceedings under the Act, there was nothing unreasonable in their saying that where the assets realizable are under a certain sum then you shall have only two-thirds of the scale which we fix for proceedings under the Act. But, when they come to costs of conveyancing business, no scale of costs is fixed, but they refer to and adopt a scale which had already been provided by the legislature under the Solicitors' Remuneration Act of 1881, which scale is so drawn up as to apply to all cases generally, with an express provision for reducing sums, which were otherwise chargeable, in cases where the amount or the value of the matter about which the business was done does not exceed 100*l.* The rules made under the Act of 1881 provide in rule 8 of Schedule I. to the General Order under that Act that "where the prescribed remuneration would

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but for this provision amount to less than 5*l.*, the prescribed remuneration shall be 5*l.*, except in transactions under 100*l.*, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee, is to be 3*l.*" So there you find a case in which, although the work done may be quite as heavy and quite as laborious, yet when the transaction is under 100*l.* the remuneration is to be three-fifths of what it would otherwise be. Therefore you have a scale which does take into consideration the amount of the transaction, and does make the amount of the charge in accordance with the amount of the transaction when it is less than 100*l.* Having regard to this one cannot understand why the legislature, after cutting down the charges to three-fifths where the amount of the transaction is 100*l.*, should cut them down another two-fifths, and reduce them consequently from 5*l.*, which the ordinary charge would be, to 36*s.* The words which are used are "proceedings under the Act." Now, that has a meaning capable of being given to it by holding that it applies to all those proceedings mentioned in the scale of costs, Nos. 2, 3, 4, 5, and 6. I exclude No. 1 because it is excluded by the rule. But with regard to all the others mentioned in Nos. 2 to 6, they are strictly proceedings under the Act for which, except for the scale of costs provided by the Act, there would be no scale at all, and, consequently, it is natural that there should be the general reduction made applicable to cases where the amount which is to be realised is less than 300*l.* But where the Act does not prescribe a scale which is generally applicable, but takes a scale which is provided under another statute, and which scale itself makes provision for a reduction in the amounts charged where the transaction is small, certainly one would not expect to find the legislature would go on to cut down the remuneration to a still greater degree. It is clear from the language of the rule itself that it does not apply to auctioneers', or brokers', or accountants' charges, but only to solicitors' charges; and it seems to me that the effect of the words used in the Act is that it only applies to those charges which, as I have said, are charges for work done in proceedings under the Act, that is to say, included in the scale of charges No. 2 to No. 6 inclusive, and does not apply to business done in

the way of conveyancing or otherwise under General Regulation 2, which I do not think can fairly and properly be said to be "proceedings under the Act." For these reasons I am of opinion that the decision of the taxing master must be affirmed.

Solicitors: *R. Murton; R. White, for W. R. Davies, Pontypridd.*

H. L. F.

LEA *v.* CHARRINGTON.

May 9.

Malicious Prosecution—Criminal Law—Criminal Law Amendment Act—Issue of Warrant—Judicial Act.

By 48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 10: "If it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is bonâ fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorizing any person named therein to search for . . . . such woman or girl. . . . . The justice of the peace issuing such warrant may, by the same or any other warrant, cause any person accused of so unlawfully detaining such woman or girl to be apprehended and brought before a justice, and proceedings to be taken for punishing such person according to law":—

Held, that the act of the justice in issuing a warrant under this section for the arrest of the person accused is a judicial act, and is an answer to an action for malicious prosecution against the person on whose information the justice has acted.

Hope v. *Evered* (17 Q. B. D. 338) followed.

ACTION for maliciously and without reasonable and probable cause laying an information against the plaintiff before a police magistrate for unlawfully detaining for immoral purposes a certain girl against her will, on which information a warrant was obtained for the arrest of the plaintiff.

At the trial before Grantham, J., and the jury, the plaintiff proved that the defendant, upon a statement made to him by a third party, swore the information before the police magistrate, and that the magistrate thereupon issued a warrant to search the plaintiff's house and also to arrest the plaintiff. On these facts Grantham, J., held that there was no evidence of want of reasonable and probable cause.

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The statement of claim also alleged other causes of action founded on subsequent proceedings at the police court and Central Criminal Court; on these also the learned judge held that there was no evidence to go to the jury, but as these and the evidence relating to them are immaterial to this report they are not further alluded, to either in the report of the arguments or the judgments.

Morten, (*Gill*, with him), moved for a new trial. The defendant laid the information relying on an incorrect statement made by a third party and ought to have made further inquiries for himself, per Lord Esher, M.R., *Arbrath* v. *North Eastern Ry. Co.* (1) The arrest of the plaintiff was due to the act of the defendant. In *Hope* v. *Evered* (2) it was held that no action would lie against the defendant, who had obtained a search warrant under s. 10 of the Criminal Law Amendment Act, 1885, but Lord Coleridge, C.J., in giving judgment, pointed out that in such a case the liberty of the subject was not in question; that case, therefore, does not apply to the present.

McCall, for the defendant. The decision in *Hope* v. *Evered* (2) is conclusive against the plaintiff; the issue of the warrant for arrest stands on precisely the same grounds as that of a search warrant.

POLLOCK, B. This is an action for malicious prosecution, and one of the causes of action alleged is for obtaining a warrant to arrest the plaintiff under s. 10 of the Criminal Law Amendment Act, 1885. When the defendant went before the magistrate the only information he had was the statement of one Green, and no doubt that statement was incorrect. But the magistrate acted upon the information laid before him and issued the warrant. The case thus clearly comes within the decision in *Hope* v. *Evered* (2); that was, no doubt, a case only of a search warrant pure and simple, but inasmuch as it was a decision upon the same section that we are now dealing with, and the observations of the Lord Chief Justice as to the intention and meaning of the section are equally applicable to the facts of this

(1) 11 Q. B. D. at p. 450. (2) 17 Q. B. D. 338.

case, it would be mere hair-splitting to say that in the one case the justice in issuing the warrant was acting judicially, but not in the other. The magistrate decided that the defendant was acting bonâ fide in the interest of the girl, and that there was reasonable cause for suspicion, and upon this issued the warrant. The issue of the warrant was therefore the judicial act of the magistrate and not the act of the defendant. The learned judge's decision was therefore right.

MANISTY, J. I am of the same opinion. Upon the first cause of action, for falsely and maliciously laying an information on which a warrant was obtained for the arrest of the plaintiff, the case of *Hope* v. *Evered* (1) is conclusive. It is impossible to hold that when a magistrate issues a search warrant under s. 10 of the Act he is acting judicially, and his decision is an answer to an action for malicious prosecution against the person laying the information, and at the same time to hold that when the magistrate in addition to the search warrant issues a warrant to apprehend the plaintiff under the latter part of the same section, he is not acting judicially and his decision is not an answer to the action.

Motion dismissed.

Solicitor for plaintiff: *George Kebbell.*
Solicitors for defendant: *C. V. Young & Co.*

(1) 17 Q. B. D. 338.

W. A.

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Feb. 14

[IN THE COURT OF APPEAL.]

HALLIDAY *v.* PHILLIPS AND OTHERS.

Ecclesiastical Law—Church—Pew—Right appurtenant to House—Long User and Acts of Ownership—Presumption of Legal Origin—Faculty—Previous Invalid Grant by Churchwardens.

Where the successive owners of a house have had a long-continued enjoyment of a pew in a parish church, and have done a number of acts with regard to it inconsistent with mere possession by permission of the churchwardens, the grant of a faculty at some time should be presumed, although no evidence is given of such grant, and although there may be evidence that the pew was originally acquired under circumstances that would not confer a legal right.

THIS was an action against the vicar and churchwardens of Warminster for wrongfully interfering with and pulling down a pew claimed by the plaintiff in the parish church as appurtenant to his house. The defendants denied the title of the plaintiff, and justified under a faculty for restoring the church.

The case was tried before Day, J., without a jury, and it appeared that in 1680 Edward Halliday, an ancestor of the plaintiff, was lessee of a house in Warminster called the Mansion, of which he subsequently became the purchaser, and that he built a pew in the parish church. In a book called the Warminster Church Vestry and Account Book appeared the following entry: "1680. Received of Mr. Edward Halliday for the ground whereon he hath built a seat for his wife and family, 5*s*." The plaintiff in support of his claim relied on a number of acts done by his predecessors in title and by himself with regard to the pew, and on entries in the parish books from 1759 to the present time. He proved that in 1819 the pew had been repaired by direction of the then owner of the Mansion, to whom the key had been returned by the person employed to do the repairs. In 1825, 1826, 1827 and 1829 the pew was leased with the house; in 1830 it was included in the schedule to a power of attorney for dealing with the property of the owner of the house who was leaving England for a time; in 1832 it is included in a conveyance of the house from trustees to a son of the testator; a number of acts of repair were shewn and that the pew was

frequently kept locked and the lock and key were produced. The parish books from the year 1759, relating to pews and containing a series of entries as to all the pews in the church, were produced. From these books it appeared that the churchwardens were accustomed to let the pews in the church for lives, receiving a payment on renewal, and it was contended that the entries never shewed such payments for this pew, which with three others close to it were on a different footing, and were treated as proprietary pews, and described as freehold. It is unnecessary for the purposes of this report to set out the details of this evidence further than it appears in the judgments of the Court. The learned judge gave judgment for the defendants.

The plaintiff appealed.

Jeune, Q.C., and *A. B. Kempe*, for the plaintiff. There are three grounds on which the claim of the plaintiff may be supported—either by prescription under the statute; or that the right to a pew is an easement within the doctrine of *Angus* v. *Dalton* (1); or on the ground that the evidence of user, consistent only with the pew being a faculty pew, is so strong that a legal origin under the grant of a faculty should be presumed. In answer to this last ground it is said that the entry of 1680 shews that the user of the pew had its origin in an illegal act of the churchwardens. It is clear that they could not give the plaintiff's ancestor any title; but the entry is not conclusive, for it is consistent with a payment to secure the consent of the churchwardens to the grant of a faculty. But however strong the entry may be, it is not material. The question is not what was the first act of user and how it originated, but whether or not there could be a subsequent legal origin to explain the present user. It was not unusual to grant faculties in cases where persons were already in possession but without lawful authority: *Langley* v. *Chute*. (2) If it were not for the entry, the evidence of user would be irresistible. The pew was built and repaired by the occupiers of the house, which is the strongest evidence against the ordinary: *Kenrick* v. *Taylor* (3); it is dealt with in the only

(1) 3 Q B. D. 85, 4 Q. B. D 162; 6 App Cas. 740. (2) Sir T. Raym. 246.
(3) 1 Wils. 326.

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conveyance of the house—that of 1832; it is leased on four occasions with the house and receipt of rent under the leases proved; it is included with the house and other property in a schedule to a power of attorney; it had a lock and key which still exist; and it was shewn to be kept locked. Further the books of the parish from 1759 to the present time shew the difference between this and all the other pews in the church except the adjoining ones, for the former are leased for lives, but the latter are not so leased, but are evidently held on a different tenure and are sometimes described as freehold. Some of the acts proved would have been illegal as amounting to trespass unless there had been a grant of a faculty. In view of these facts the Court should presume that such a faculty was granted, which constituted a legal origin for the right claimed: *Bedle* v. *Beard* (1), *Lee* v. *Johnstone*. (2) The only facts that would displace such a presumption are such as relate to user, for instance, repairs by the parish, and nothing of this kind is shewn.

[They also argued that a pew was an easement lying in grant, and within the Prescription Act, 2 & 3 Wm. 4, c. 71, s. 2, and cited *Harris* v. *Drewe* (3), *Bryan* v. *Whistler* (4), *Mainwaring* v. *Giles* (5), and Shelford's Real Property Statutes, 8th ed. p. 115.]

Sir W. Phillimore, and *H. C. Richards*, for the defendants The entries in the books disclose that the churchwardens dealt with the pews by leasing them for lives, and it is consistent with the plaintiff's case that the occupation of this pew has been on that footing. The property in the house has descended from father to son, so that no question of right to the pew has arisen on alienation.

In *Lee* v. *Johnstone* (2) the user would have been wrongful unless founded on right, but here it might have been by leave of the churchwardens, and this would appear to have been the case from the entry of 1680. In that case the possession would not be as of right, and no title against the Ordinary would arise. In the Scotch case it was shewn as a fact that the records of title had been destroyed, but here there is no such evidence, while no

(1) 12 Rep. 195.
(2) Law Rep 1 H L, Sc. 426.
(3) 2 B. & Ad 164.
(4) 2 Man. & R. 318.
(5) 5 B & Ald. 356.

faculty is produced, nor is there any record of a faculty having ever been granted, nor is it said that any search has been made for one: *Morgan* v. *Curtis.* (1) Under these circumstances it is submitted that the learned judge was right in holding that the origin of the claim to this pew was illegal, and if so no subsequent faculty should be presumed: *Rogers* v. *Brooks* (2); *Griffith* v. *Matthews.* (3)

LORD ESHER, M.R. The only right the plaintiff has against the defendants in respect of the pew he claims must be that it is appurtenant to a house in the parish. It is said that this can be shewn in one of three ways, either by prescription at common law or under the statute, or by shewing such circumstances as call on the Court to presume that there has been a grant of a faculty. The plaintiff does not rely on the common law right, and I am not going to decide whether the statutes as to prescription apply in such a case. The question therefore turns on whether the facts are such that we are called on to presume a lost faculty. The plaintiff has shewn that he and the former owners of the house he now occupies in the parish have, for 200 years past, been in possession of the pew he now claims. That alone would not entitle us to say that his possession of the pew is appurtenant to the house. But he has shewn in addition that some of the owners of the house, the first of whom built the pew, have had a key to the pew, that they have from time to time repaired the pew, and that whenever the house has been dealt with in documents of title, either in a conveyance or by way of lease, the pew has been treated as appurtenant to the house. The question is whether such facts are not evidence of more than a mere possession of the pew and do not establish a proprietary possession appurtenant to the house. In order to be in a position to ask us to presume a faculty the plaintiff must rely on the existence of such facts over more than a short period of time. The time in this case is 200 years, and it seems to me that under these circumstances there is primâ facie evidence of proprietary possession, and that the Court should presume in favour of so

(1) 3 Man. & R. 389. (2) 1 T. R 431, n.
(3) 5 T. R. 296.

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long and continuous possession that a faculty has at some time existed, and for this reason, that it is almost impossible that such facts could exist, not founded on a right, without being challenged. Further, it should be noticed that some of the acts, such as locking the pew, or doing repairs (unless with the leave of the churchwardens), would have been illegal in the absence of such a title. But then it is said that if it can be shewn that the original possession arose under circumstances which would not support a legal right that is sufficient to negative the claim. I agree that if the case were founded on common law prescription such an objection would be fatal, but the case is different where the claim is based on the presumption of a lost faculty, for it is consistent with the facts that, after the supposed illegal origin of the right, the persons interested may have procured that which would give them a good title. This is in accordance with the doctrine laid down in *Bedle* v. *Beard.* (1) The defendants have attempted to shew from the parish books facts inconsistent with the existence of a faculty, but I think they have not succeeded in doing this, but that after a possession such as has been proved, extending over 200 years, and in face of the numerous acts such as have been described, the plaintiff has made out his case, and that it is the duty of the Court to draw the inference in his favour. The appeal will therefore be allowed.

BOWEN, L.J. It seems to me that there is hardly any principle more important in English law for a Court of Justice to insist upon and enforce, than the principle that we ought to support quiet, ancient, and long possession by preventing those who, by themselves or their predecessors, have for a long time been in open enjoyment as of right, from being driven into difficulties and forced to hunt up and produce at their peril, proof of the way in which their rights first began.

The truth is here that the right which is claimed is one in favour of which every presumption ought to be made if the plaintiff succeeds in shewing that he has been—with those who have gone before him—for a very long time in such an enjoyment of the right to this pew as would raise the inference against the

(1) 12 Rep. 195.

churchwardens and the Ordinary, whose officers they are, that there must have been some rightful origin at some time or another by which that enjoyment is authorized.

In order to see whether there is in this case that class of evidence, and that bulk of evidence, extending over a sufficient time to raise that inference, it is necessary carefully to attend to the exact nature of the right which is claimed, which is a special one. The first thing to remember is that the soil and freehold of the church is in the parson—that the use of the body of the church and the use of the seats belong to the parishioners, but that the disposal and arrangement of the seats belong to the Ordinary, who usually leaves the matter in the control of the churchwardens, who for that purpose are his officers.

The possession of a pew in a church may raise a good possessory title against a mere wrongdoer; but as against the churchwardens and the clergyman of the parish, such as are the defendants in this case, it is not enough. It is convenient and decent that respect should be had by the churchwardens, in allotting the seats, to the fact that a man and his family have been in the habit of enjoying a particular place in the church; and in practice the churchwardens in churches which are well arranged and organised do, and are obliged by the ecclesiastical law to, have regard to habit and to custom in that matter. So that the mere possession of the pew raises against the officers of the Ordinary, or against the rector, no presumption of right.

But there is another kind of right in pews, to the consideration of which the present inquiry belongs, that is the exclusive right to a pew even against the Ordinary himself. A claimant to a pew appurtenant to a house may succeed if he can shew such acts of user as are only to be explained on the presumption of a right created since the date of legal memory by some faculty which he is unable to produce. If he can shew a strong case for a long time of acts of user which are more consistent with the existence of such a right than the reverse, it is the duty of the Court to apply the presumption which I mentioned at the beginning of my judgment, and to say that there has been some legal origin to account for so long and so undisturbed a possession, and that that legal origin must be a lost faculty. It seems to me that,

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for the purpose of applying the doctrine of the presumption of a lost deed, there can be no distinction between the case of a faculty and of an ordinary grant, whether a faculty be a grant within the meaning of the Prescription Act or not.

If that is the nature of the law, when you come to deal with the evidence, you require, as against the Ordinary, something more than the evidence which would be sufficient against a mere wrongdoer. We must look, therefore, in this case, to see whether there is a substantial length of time and chain of acts which would be inconsistent with the Ordinary's rights, unless such acts are based upon some such legal origin as I have indicated. In the present case what are they? In the first place the pew was built by the plaintiff's predecessor in title. That is not conclusive, because a man may, by indulgence of the Ordinary, build a pew which it is not within his strict legal right to do; but still the building of the pew is a fact which cannot be left out of sight. The pew was built 200 years ago. From that date to this it is common ground between the two parties that it has been occupied by the family of the plaintiff and his predecessors in title who have lived in the house to which he claims it now to be appurtenant. During the present century the pew has been repaired by and at the expense of the plaintiff or his predecestors, and the repair of the pew, as has been pointed out in a number of cases, among others, *Kenrick* v. *Taylor* (1), is just that kind of act of user which is evidence against an Ordinary, and snch an act as indicates more than mere possession or occupation of the pew. Then we have again the key, and the key and the lock are certainly as old as 1819, and were used to lock the pew The possession of the key, as was pointed out I think in the case of *Rogers* v. *Brooks* (2), is another act of user exactly of the same class as those acts of user which would be inconsistent with the rights of the parson and the Ordinary unless they can be explained by finding some legal origin for them. Then, lastly, we have the books of the parish, which seem to me to be favourable to the case of the plaintiff. It is not necessary to consider whether they are legal evidence against one party or the other, for it is the wish of both sides that we should treat them as evidence.

(1) 1 Wils. 362. (2) 1 T. R. 431, n.

In this parish there was great laxity in the way in which the pews were dealt with. The churchwardens for at least a couple of hundred years have been in the habit of taking money for the pews and allotting the pews on leases for lives without any complaint on the ground of irregularity; but through the parish books, irregular as the transactions which they disclose have been, it is remarkable that three or four pews, of which this was one, are treated differently from the rest, and the distinction culminates in the entry which is copied into a book of 1835,—the real date of the volume in which the original entry was made being, I think, 1819,—where the four pews of which this is one are entered as distinct from the rest—not treated as other pews are which are held on leases for lives, but treated as if they were exceptions. It is perfectly true that in the parish books from time to time this pew is classed amongst other pews as a freehold, a title which, if the plaintiff's case is right, does not strictly belong to it; but I do not feel impressed by that so much as I do by the exceptional way in which this pew and the two or three other pews are treated.

Lastly—though I do not think it is evidence in favour of the plaintiff, but as Sir Walter Phillimore relied on it as evidence against him I must deal with it—there is the diary of 1833 in which the plaintiff's grandfather treats this pew as a family pew. A family pew is one which descends with the family from father to son, not merely one leased for lives to be taken back at the option of the churchwardens, but one that belongs to the inhabitants of the house and goes with it. But the matter does not rest there, because this pew has been let with the house by the owners of the house for several years.

Taking all that body of evidence together, would not a reasonable person say that there is something about that pew different from other pews in the church, and that the way in which it has been treated is only explicable on the suggestion that the plaintiff and his predecessors have had a right to treat it in the way they have done? If the answer to the inquiry is yes, one must draw the inference and act upon the presumption (and that is the presumption which in this case we are invited to raise), that there must have been a faculty to account for what otherwise would be

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a high-handed usurpation of this pew. Day, J. seems to have thought that the presumption of the legal origin was displaced, because he fancied he saw the exact origin of the supposed right, and that it was an origin in a wrong. But it is consistent with the facts in this case that although the churchwardens in the first instance had no right to give the pew away as they did for 5*s.*, yet the very next day, or the next week, or the next month, the plaintiff's predecessors in title got a faculty which made that valid which was otherwise invalid. The law in the case of such a lost deed does not seem to me to require that you should go back to the very earliest trace of user and see whether at that earliest moment you can find a complete legal title to the pew, or find acts, which will at all events prevent you from saying that the first act of enjoyment was not invalid. You must take things as a whole, and, if the bulk of this user can be explained by the granting of a faculty at some time or other, it is not unreasonable to suppose that the faculty was granted in 1680, and it is no answer to the application of the presumption of law to shew that in 1680 no such right existed, though it may have existed in 1681.

FRY, L.J. That possession is nine points of the law is a very common but very true saying, and it summarises a very considerable body of legal doctrine. One of the ways in which that doctrine appears is this, that the Courts are under an obligation, which has been insisted upon over and over again, wherever they can, to clothe with legal right long continued and undisputed enjoyment; and in my judgment that obligation rests upon the Court although enjoyment may be shewn to have had de facto an invalid or illegal or insufficient origin. I think where there has been long usage, long possession, or long enjoyment, even although there may be an original infirmity in the de facto commencement, the Court is bound to presume, if it can, that that illegal origin has been altered by something which has occurred in the course of time.

That that is so seems to me strongly supported by the case of *Bedle* v. *Beard* (1), and I think that a similar doctrine will be

(1) 12 Rep. 105.

found to have been applied to the case of husband and wife in the *Breadalbane Case* (1), before the House of Lords, where the relation between the man and woman was originally an illicit connection, but where the Court inferred a subsequent consent to marriage. I think therefore it is not enough in this case to point our attention to the minute of 1680, which seems to shew that in fact this possession had an origin which was not sufficient in law.

That being the law applicable to the case I have this further observation to make, that between a pew and many other kinds of property there is obviously a distinction. Every parishioner has a right to enter the parish church, and has a right to a seat in that parish church, and this, coupled with the habit of the churchwardens of appropriating certain seats to certain families, may account for the continuous and long possession of seats without any title to them, but will not sufficiently explain either exclusive possession or repairs being done to the pew. Therefore, in this case we are driven to this inquiry: are the facts of this case more consistent with the plaintiff's theory of a lost grant, or are they equally consistent with that theory and with the theory of an unlawful possession throughout?

The facts shortly summarised seem to me to be these. They are in the first place the building of the pew; in the next place the exclusive user of this pew, which I think may be taken to be the result of the evidence, and in the third place the repairs to the pew. In the year 1819 the then Mr. Halliday handed the key to his carpenter for the purpose of repairing the pew, and it was returned to the owner. Then, according to the recollection of the plaintiff, the pew was ordinarily kept locked. With regard to repairs, it is not merely that doing repairs is a strong indication of property in the thing to which the repairs are done, but in the case of the church there is this further consideration, that the act of entry to do repairs would be a trespass unless there was a title to the pew. In the present case we have no less than five acts, all of which bear upon this point, between 1819 and 1854, all done so far as appears without any licence from the churchwardens, all wrongful acts if the defendants' theory be

(1) 4 Macq. 711; L. R. 2 H. L. (Sc.) 269.

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true, all rightful acts if the faculty had been granted. Again, we have the leasing of the pew with the house, its being conveyed with it and power to deal with it being given by a power of attorney. All these acts were unlawful if the plaintiff had no title in the pew; lawful if he had a title.

Then we have brought before us the church books, beginning with the book of 1759, and the entries impress the mind with the difference between the position of this and the two adjoining pews and the great mass of pews in the church. In the case of other pews the lives are entered in a very intelligible manner. If the life dies the death is entered against it. If a new life is substituted the new life is entered against it, and the date when the sale is made, the price paid, and the churchwardens by whom the sale was made are all entered. When we come to this pew we find a totally different kind of entry. The same observations apply to the subsequent ledgers, and, without saying that the entries in the ledgers would be in any way conclusive without the acts to which our attention has been drawn, this is plain, that in 1759, in 1790, and in 1819, three pews including this one are always treated by the churchwardens as standing on a different footing to the other pews in the church. I cannot help feeling that the learned judge in this case has overlooked this particular view of the case, and that his attention was drawn more exclusively to the origin of the right, and was not given sufficiently to these facts.

I think the proper judgment will be to discharge the judgment of Day, J., and to make a declaration that the plaintiff was entitled to the pew formerly existing as appurtenant to his house called the Mansion, and is now entitled to have a pew on the site of the former pew; and to grant an injunction restraining the defendants or any of them from interfering with the plaintiff's enjoyment of the pew.

Appeal allowed.

Solicitor for plaintiff: *J. J. Garrod.*

Solicitors for defendant: *Brooks, Jenkins & Co.*

A. M.

[IN THE COURT OF APPEAL.]

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May 4.

THE QUEEN *v.* THE LAND COMMISSIONERS OF ENGLAND.

Copyhold Enfranchisement—Compensation for Manorial Rights—Valuation by Umpire—Remitting Valuation erroneous in Amount—Refusal to amend—Determination of Value by Commissioners—Copyhold Act, 1887 (50 & 51 *Vict. c.* 73), *s.* 11.

By s. 11 of the Copyhold Act, 1887: "The valuers appointed under the provisions of the Copyhold Acts shall determine the value of the manorial and other rights and incidents, such value to be a gross sum of money, and their decision shall be in such form as the Commissioners may prescribe, and they shall in every case deliver the details of the valuation to the Commissioners, and if it shall appear to the Commissioners that the valuation is imperfect or erroneous, they may remit it for reconsideration or correction; and if the valuers neglect or refuse to amend the same the Commissioners may, after due notice to the lord and to the tenant, and after fully considering all the circumstances brought before them, determine the value of the manorial and other rights and incidents at such a sum as they may deem just and reasonable."

On a valuation of manorial rights under the Act it appeared to the Commissioners that the valuation was erroneous in amount, and they remitted it to the valuer, who refused to amend. The Commissioners thereupon proceeded to consider the circumstances with a view to themselves determining the value. On an application for a prohibition to restrain them from proceeding to determine the value except as appeared by the award:—

Held (reversing the decision of the Queen's Bench Division), that the Commissioners were acting within their jurisdiction in proceeding to determine the value of the rights, as the authority given them by the statute applies where, in their opinion, the valuation is erroneous in amount.

RULE calling upon the Land Commissioners for England to shew cause why a prohibition should not issue to prohibit them from further determining the value of the manorial and other rights and incidents in connection with the enfranchisement of copyhold hereditaments mentioned in an award of Edward Tewson, Esq., or from taking any steps to confirm any award with respect to such enfranchisement, save and except the award of the said Edward Tewson.

It appeared from affidavits that, under a vesting order of the Chancery Division, Francis Vigers had been admitted tenant of certain copyhold estates within the manor of Leigham, and proceedings for enfranchisement were taken under the Copyhold

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Act, 1887, by the appointment of two valuers. The valuers disagreed and the matter was referred to an umpire, who made and forwarded to the Land Commissioners his award, with details of his valuation. The lord of the manor applied to the Commissioners to review the decision of the umpire on the ground that he had under-estimated the value of the hereditaments, and to hold that on this ground the award was erroneous within s. 11 of the Copyhold Act, 1887. It appearing to the Commissioners that the umpire's estimate of the value of the property was too low, they remitted the valuation for reconsideration and correction. The umpire declined to make any alteration, whereupon the Commissioners gave notice to the parties of their intention themselves to determine the value of the manorial and other rights pursuant to the Copyhold Act, 1887, s. 11. A rule having been obtained, as above mentioned, on behalf of the tenant.

F. M. White, Q.C., and *T. T. Paine*, shewed cause.
Reginald M. Bray, appeared for the lord of the manor.
H. F. Dickens, supported the rule.

THE COURT (Denman and Hawkins, JJ.) were of opinion that the Commissioners had no jurisdiction to act as they proposed, on the ground that the words "imperfect or erroneous" in s. 11 apply only to a valuation imperfect and erroneous in form or in principle, or in improperly including or excluding matters of compensation, and not to mere error in amount; the rule was therefore made absolute for a prohibition.

The Commissioners appealed.

F. M. White, Q.C., and *T. T. Paine*, in support of the appeal. The Land Commissioners are acting within the powers given them by s. 11 of the Copyhold Act, 1887, which enacts that "the valuers appointed under the provisions of the Copyhold Acts shall determine the value of the manorial and other rights and incidents, such value to be a gross sum of money, and their decision shall be in such form as the Commissioners may prescribe, and they shall in every case deliver the details of the valuation to the Commissioners, and if it shall appear to the Commissioners that

the valuation is imperfect or erroneous, they may remit it for reconsideration or correction; and if the valuers neglect or refuse to amend the same the Commissioners may, after due notice to the lord and to the tenant, and after fully considering all the circumstances brought before them, determine the value of the manorial and other rights and incidents at such a sum as they may deem just and reasonable." By the Copyhold Act, 1852, s. 52 (1), the word "valuers" includes an umpire, and the same interpretation is to be given to it in the Copyhold Act, 1887, by s. 49. In the present case it appears to the Commissioners that the valuation is "erroneous"; the umpire has refused to amend; they have given notice to the lord and the tenant; and are prepared to fully consider all the circumstances brought before them. The fact that what appears to be an error is in the amount of the valuation does not affect their jurisdiction.

Edward Bray, appeared for the lord of the manor.

Finlay, Q.C., and *H. F. Dickens*, for the tenant. The question turns on the meaning of the words "imperfect or erroneous" as used in s. 11 of the Copyhold Act, 1887. Under the earlier Acts the Commissioners could not assess the amount of compensation. Their power over an award was to see that the valuer had not exceeded his jurisdiction, and that his award was in form and good on the face of it. Under s. 8 of the Copyhold Act, 1852, the power given is to refer "any question of law or fact material to such valuation" to the Commissioners. This cannot be taken to include the conclusion as to amount. The Copyhold Act, 1887, s. 11, has the same effect. The decision of the umpire is to be in such form as the Commissioners prescribe, and details of the valuation are to be given, in order that the Commissioners may see whether he has taken into or omitted from consideration any matter which ought to have been excluded or included, as the case may be, and if it appears to them that the valuation is imperfect in form or erroneous in principle the valuation may be remitted. It is not suggested that the valuation of the umpire is bad in form, or that it does not comprise every subject-matter of compensation. But is said that his opinion is wrong, and on that the Commissioners propose to take the matter into

(1) 15 & 16 Vict. c. 51.

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their own hands. This is not warranted by the Act, and is an excess of jurisdiction.

LORD ESHER, M.R. In this case, upon a question of enfranchisement, the parties have thought it right to have the matter in dispute between them determined through the agency of the Land Commissioners. That being so, the preliminary steps necessary under the Act were taken, valuers were appointed, who differed in opinion as to what was the value which was to be the basis of the award, and they appointed an umpire who came to a conclusion which he made known to the Commissioners. Thereupon the Commissioners, objection being taken before them, on behalf of the lord, that the valuation was too small, inquired into the matter, and, not being satisfied with the valuation, sent it back to the umpire to reconsider and amend. He declined to alter his conclusion, and thereupon the Commissioners intimated that they themselves would examine into the matter, would have the parties before them, and would come to a conclusion as to what was a proper valuation. On that state of facts it is suggested that they were about to do something which was beyond their jurisdiction, and a prohibition was asked for and granted by the Divisional Court. The prohibition is in effect against the Commissioners inquiring any further whether the conclusion of the umpire was right or wrong. It is argued that the Commissioners are bound by the decision unless they can see that the umpire has come to his conclusion on wrong principles. That depends on what are the position and powers of the umpire, and that again depends on the true construction of the statute. The former Acts were cited to shew what the state of the law was when this Act was passed, but it does not seem to me necessary to determine what was the exact position under the Statute of 1852, and whether, under s. 8 of that Act, the Commissioners could themselves have determined the value and made an award accordingly under s. 9. If they had not that power the question would still remain whether they have it under the last statute. That brings us at once to s. 11 of the Act of 1887, to see what is the true construction. By that section the valuers are to determine the value of the manorial and other rights, and primâ facie that

expression "determine" is in favour of the argument that the decision of the valuers is conclusive. But then they are to determine the value at a gross sum of money, and their decision is to be in such form as the Commissioners may prescribe, and they are to deliver the details of the valuation to the Commissioners. It strikes one at once that, if the decision of the valuers as to the gross sum is to be final and conclusive, there would be no use in their sending details. It is said this is to be done that the Commissioners may see if the valuers have decided on right or wrong principles, and that all the Commissioners can do is to look at the valuation and the details, and see from those documents whether there has been any error in principle. Let us see what the Act says. "If it shall appear" that is not limited to what appears on the face of the two documents, for the words are quite general. It was argued at first that the Commissioners could only look at the two documents, but that suggestion was afterwards modified, and it was admitted that it might be made to appear aliunde that there had been an error in principle. What is there to limit the inquiry to an error in principle? What the Commissioners have to consider is the valuation, that is the conclusion as to amount, and if that is wrong in amount, why is it not erroneous? What difference does it make whether the error arises from a wrong conclusion on a right principle or from applying wrong principles? The injury to the parties is the same in each case, and I can see no reason for adopting the limitation suggested. The Commissioners are to exercise judicial functions, but, if it appears to them by evidence that there is an an error which will do injustice, they may remit for reconsideration or correction. The valuers may agree or they may stand by what they have decided. In the latter case they refuse to amend, and the Commissioners in such a case are to hear both sides, and on inquiry and evidence are to determine the value "at such a sum as they may deem just and reasonable"; that is, they are to take the inquiry into their own hands, and to do what the valuers had to do in the first instance. Then comes the question what is to happen if some amendment is made, but still the conclusion is not to the satisfaction of the Commissioners. I see nothing in the section to confine the action of the Commissioners to one

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objection only, so as to bind them by a partial amendment made by the valuers but not satisfactory to the Commissioners. I do not, however, think they are obliged to send the valuation back to the valuers a second time, but that when it comes back to them after they have once remitted it, they may then deal with it, and make their award of the sum they may deem just and reasonable. To my mind there is nothing in the Act to make the decision of the valuers binding on the Commissioners. The truth is, the valuers are not arbitrators but assessors and assistants to the Commissioners, and the award is made by the Commissioners under the authority given by the statute. I cannot agree with the decision of the Divisional Court, and I think that the appeal must be allowed.

LINDLEY, J. I am of the same opinion. The question in the case turns on the true construction of s. 11 of the Copyhold Act of 1887, and that Act is one of a group commonly referred to as the Copyhold Acts. There are half-a-dozen of them; they begin in 1841 and go on 1843, 1844, 1852, 1858, and 1887, and s. 50 in the Act of 1887 says this is to be one of that group of Acts. It is necessary, therefore, not only to look at the language of s. 11, but also to see what light is thrown upon that section by the other Acts. The scheme of the legislature appears to have been from first to last that the Commissioners, first of all the Copyhold Commissioners, and now the Land Commissioners, should be the persons who in the final resort should decide the matters which arise under those Acts. It must be borne in mind that these Acts are applicable not only between people who are sui juris and can make bargains for themselves, but to tenants for life, and infants, and in all sorts of cases where persons are not capable of making bargains, and the ultimate decision appears to me from first to last to rest with the Commissioners. That appears on looking through the provisions of the former Acts, and in the Act of 1887 all doubt, if doubt there was, is removed, because by s. 11 the valuers are to furnish the Commissioners with details on which they are to proceed. That shews that the Commissioners are the persons appointed to review what has been done. On looking at s. 8 of the Act of 1852, on which Mr. Finlay

relied, I cannot adopt the narrow construction which he suggests. It seems to me that the expression "any matter of fact material to the valuation" includes such matters of fact as raise a question of amount and that the determination of amount cannot be excluded, and when I look at s. 11 of the Act of 1887, having got the general working of the machinery from the former Act, I find the language so wide that I see no warrant whatever for cutting it down. The words are, "if it shall appear to the Commissioners that the valuation is imperfect or erroneous they may remit it for reconsideration or correction." It was argued that this means "if it shall appear from the details sent in." I cannot agree to that. It is quite obvious to me that if this section is considered in connection with s. 8 of the Act of 1852 it means—if it shall appear to the Commissioners, from any evidence legitimately before them, that the valuation is imperfect or erroneous, then they are to proceed as directed. The Commissioners are the judges whether the valuation is imperfect or erroneous, and if they think it is, they are to remit it for reconsideration or correction, and if the valuers say that there has been no mistake, or, to use the language of the section, if the valuers "neglect or refuse to amend the same, the Commissioners may determine the value of the rights." I am unable in the face of this general language to see any justification for cutting down the scope of the section. I attach little importance to the argument based on s. 41 of the Act of 1858, which deals with Crown manors, for there the machinery is different, for a surveyor has to be called in, as distinguished from valuers, and the language is express that his award is to be final. The key to the whole thing is this—that the award which is effective is not the award of the valuers, it is the award of the Commissioners, that is so from first to last, it is their decision and their award which binds the parties. I am therefore of opinion that the appeal ought to be allowed.

LOPES, L.J. I entirely agree with what has been said, and I only desire to say this, that, having regard both to the earlier statutes and to the statute of 1887, and more especially to s. 11 of that Act, I am of opinion that the valuers are in the position of assessors, assistants to the Commissioners, and that the ultimate

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determination is vested in the Commissioners. I think, therefore that this rule should be discharged.

Appeal allowed.

Solicitors for prosecution: *Blair & W. B. Girling.*

Solicitors for the lord of the manor: *G. H. K. Fisher & G. A. Fisher.*

Solicitors for defendants: *White, Borrett & White.*

A. M.

April 30.

THE QUEEN *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF RAMSGATE.

Local Government Acts—Officer of Local Authority—Payment of Commission on Contracts with Local Authority—Illegal Payment by Local Authority—Disallowance of—Discretion—Allowance in addition to Salary—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 189, 193—*Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 141, 226.

A local authority employed one of their officers, apart from his ordinary duties, to superintend the execution of certain works on their behalf, upon the terms that he should be paid for his services by a commission upon the contract price of such works, whereby he became "interested" in the contract for the works contrary to the provisions of s. 193 of the Public Health Act, 1875. The officer duly superintended the execution of the works, and the local authority passed resolutions for the payment of, and paid him, the amount of the stipulated commission. On application for a certiorari to bring up such resolutions for the purpose of quashing them, it was admitted by the defendants that the payment was invalid, but it was contended that a fixed sum equal to the amount of the commission might have been lawfully paid to the officer as an "allowance" under s. 189 of the Public Health Act, 1875, and that the invalidity of the payment being in form rather than in substance, the Court in the exercise of their discretion ought to refuse the application:—

Held, that the payment being illegal, the application must be granted.

Semble, that the term "allowance" in s. 189 does not include an allowance of money.

RULE for a certiorari to bring up certain resolutions or orders of the defendants to be quashed under 45 & 46 Vict., c. 50, s. 141.

In the year 1885 one W. C. Barley was employed as town surveyor by the defendants, the local authority for the borough of Ramsgate. The defendants, being about to carry into execution a scheme for the drainage of their borough, by a resolution of July 25, 1885, employed Barley, outside his ordinary duties as

surveyor, to superintend the construction of the drainage works as their engineer, and agreed to remunerate him for his extra services by a commission of 5 per cent. upon the contract price of one portion of the works not exceeding 450*l.*, and a commission of 3 per cent. upon the contract price of the residue of the works not exceeding 330*l.* Barley duly superintended the execution of the works, and the defendants by an order of February 2, 1886, ordered the sum of 300*l.* to be paid out of the borough fund to Barley on account of such commission. By an order of February 1, 1887, they ordered the payment to him of a further sum of 100*l.*, and by an order of June 7, 1887, they ordered the sum of 380*l.*, being the balance of the agreed commission, to be paid to him. Shortly after the payment of the first of the above mentioned sums, an action was brought against Barley by one Whiteley, a ratepayer of the borough, to recover a penalty of 50*l.* under s. 193 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), on the ground that Barley was "concerned and interested" in the contract between the defendants and the contractors who executed the works. Mathew, J., before whom the action was tried, held that he was so interested, and adjudged him to pay such penalty. (1) On appeal this judgment was affirmed. (2)

By an order of July 26, 1886, the defendants ordered a further sum of 300*l.* to be paid to Barley for his costs in defending that action. A rule nisi was then moved for and obtained, on behalf of a ratepayer, for a certiorari to bring up the five above-mentioned resolutions or orders that the same might be quashed on the ground that they were illegal and ultra vires.

Henn Collins, Q.C., and *Dickens*, shewed cause. It is not disputed that the orders for the payment of the commission were invalid under s. 193. The mistake consisted in agreeing to remunerate by commission. The sum was such as would have had to be paid to any one else who had been employed to do the work. And if the agreement had been to pay a fixed sum of 780*l.* instead of a commission not exceeding 780*l.* such sum might have been lawfully paid as an allowance under s. 189. (3) In *Burgess* v.

(1) 20 Q. B. D. 196.

(2) 21 Q. B. D. 154.

(3) By 38 & 39 Vict. c. 55, s. 189: "Every urban authority shall from time to time appoint fit and proper persons to be medical officer of health,

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Clark (1), Brett, M.R., says that an allowance under that section "means a payment beyond the agreed salary of the officer for additional services," and this payment if it had been fixed in amount would have come within that definition. By the infliction of the penalty upon Barley for his illegal interest in the contracts, the justice of the case has been met. It would be unfair to go further and make the individual members of the corporation liable for the sums paid, seeing that the borough has had the benefit of the services for which they were paid. According to the terms of s. 141 of 45 & 46 Vict. c. 50, the Court has a discretion whether it will grant a certiorari or not, and under the circumstances of the case the Court ought in the exercise of that discretion, to refuse to do so. In *Reg.* v. *Prest* (2) it was held that the Court is not obliged to disallow payments actually made, although the charges in respect of which they were made were so far irregular that payment could not have been enforced. There is no distinction between an irregular payment by a corporation and an illegal payment. These corporations are the creatures of statute, and any act in excess of their statutory powers is just as much illegal as if it had been prohibited. Therefore that case is an authority in favour of the contention that the Court ought not to disallow the payment here.

In *Reg.* v. *Mayor, &c., of Gloucester* (3), where the facts were identical with those in the present case, with the exception that the sum paid for the extra services was a fixed sum and not by way of commission, the Court intimated that, even if they had had power to grant a certiorari under the Act of Parliament under which the application for it in that case was made, they would have refused to grant it.

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surveyor, &c. . . . . The urban authority may pay to the officers and servants so appointed or employed, such reasonable salaries, wages or allowances as the urban authority may think proper."

By 45 & 46 Vict. c. 50, s. 141: "(1) Any order of the council for payment of money out of the borough fund shall be signed by three members of the council, and countersigned by the town clerk. (2) Any such order may be removed into the Queen's Bench Division of the High Court by writ of certiorari, and may be wholly or partially disallowed or confirmed on motion and hearing, with or without costs, according to the judgment and discretion of the Court."

(1) 14 Q. B. D. 738.

(2) 16 Q. B. 32.

(3) 23 J. P. 709.

The order for the payment of Barley's costs of his defence against the action for penalties was within the powers of the defendants under s. 226 of 45 & 46 Vict. c. 50, under which section corporations are empowered to pay the costs of their officer in defending a proceeding against him for any act done in intended execution of the Act. The remuneration by commission was such an act done in intended execution of the Act since it might have been made by allowance.

Kemp, Q.C. (*T. Willes Chitty*, with him), in support of the rule. Even if the defendants had agreed to pay Barley a fixed sum of money for his services such payment would not have been an "allowance," for that term refers not to a money payment but an allowance of "the use of a room, or coals, or candles, or articles of the like kind," as suggested by Cotton, L.J., in *Burgess* v. *Clark*. (1)

The payment in this case was illegal and not merely irregular, for it was expressly prohibited, and there is no case in which the Court has ever refused to disallow a payment which was illegal. The case of *Reg.* v. *Prest* (2) was a case of mere irregularity.

In *Reg.* v. *Mayor, &c., of Exeter* (3) the Court directed an order for a payment out of the borough fund not authorized by the Municipal Corporations Act to be quashed. If the Court does not exercise this power there are no means of protecting the ratepayers.

FIELD, J. This is a rule nisi for a certiorari to bring up and quash certain resolutions of the corporation of Ramsgate: the first of which is a resolution appointing their surveyor, one Barley, to act as their engineer in superintending the carrying out of a certain drainage scheme, and directing that he be paid for his services by a commission upon the amount of the contract price of the works.

Now it has been already held by the Court of Appeal that by reason of that resolution Barley was concerned and interested in the drainage contracts on which his commission was dependent, and consequently was liable to a penalty under s. 193 of the

(1) 14 Q. B. D. 738. (2) 16 Q. B. 32.
(3) 6 Q. B. D. 135.

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Public Health Act, 1875, and judgment for the amount of that penalty has been given against him.

But this proceeding is a step further, being a proceeding for the disallowance of the payments which have, in fact, been made in pursuance of the above resolution. And we have been called upon by the defendant not to make the rule absolute on the ground that it is a matter within our discretion, according to the express terms of the section under which the rule has been moved, whether we should issue the certiorari or not, and that under the circumstances of this case we ought in our discretion to refuse the writ. There has been cited to us the case of *Reg.* v. *Prest* (1) as an authority for the proposition that where a sum of money has been bonâ fide paid by a corporation for services rendered, and such sum is nothing more than a fair and just sum to be paid for the benefits which it has received, the Court will not interfere to set that payment aside merely because it is in form ultra vires and illegal by reason of its non-compliance with some statutory provision. And it was said that the payment to the surveyor in this case having been made honestly, and being a fair and reasonable payment in respect of services, the benefit of which the ratepayers had enjoyed, was a matter which was in fact harmless, and one with which we ought not now to interfere. But I cannot agree that it was harmless, it was not a mere irregularity, but a payment which was positively prohibited by the statute.

But then it was argued that the payment complained of might have been made with perfect legality if it had been made in another form, namely, as an "allowance" under s. 189. And in support of that contention an authority was cited giving a defition of the word allowance as being "a payment beyond the agreed salary of the officer for additional services rendered by him." But I think that that definition is too large. To my mind an "allowance" means an allowance of something other than money, and does not include pecuniary payment. The view of Cotton, L.J., seems to me preferable to that of the Master of the Rolls.

Can we then, in the exercise of our discretion, confirm these

(1) 16 Q. B. 32.

orders? I think not. The policy of the statute is wide-spreading, as every day more and more of our affairs are being entrusted to the management of local bodies. It is a matter of the highest importance to keep that policy well upheld, and not to allow such bodies to outstep the limits of their authority. I think it would be very dangerous for us to allow these payments to stand good, seeing that they have been expressly prohibited under a penalty by the legislature. The case seems to be governed by the principle of *Reg.* v. *Mayor, &c., of Exeter.* (1)

CAVE, J. I am of the same opinion. We start with the admission that these orders which it is sought to bring up to be quashed are contrary to s. 193 of the Public Health Act, 1875, which provides that "officers or servants appointed or employed under this Act by the local authority shall not in any wise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act." It has already been decided by Mathew, J., and by the Court of Appeal affirming his decision, that the payments to which these orders relate are within that section, and are consequently illegal. Therefore, if the case stood there, it would be a matter of course that we should let the writ of certiorari go.

But then it is said that we have a discretion in the issuing of the writ, and that we ought to exercise our discretion in the way of refusing it because, although what has been done is illegal in form, the very same thing if done in a slightly different form might have been done with perfect legality; that is to say that if the council, instead of passing a resolution that their surveyor should be paid a percentage on the amount of the contracts, had passed a resolution that he should be paid a lump sum of 780*l.* —the sum which his commissions amounted to—by way of "allowance" for his trouble in superintending the execution of the works, they would have been acting within the limits of their statutory powers. Now I am not prepared to express a decided opinion whether or not the payment of such a lump sum would be an allowance within the meaning of the Act; and I should like time to consider the question further before coming

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to any definite conclusion on the point. Primâ facie I should have thought that the term "allowance" would not cover sums of money paid to an officer for extra work done outside of his regular duties, but that it referred rather to an allowance of a house to live in, or an office to do his business in, or coals, gas, candles, and things of that sort which it might be more advisable and convenient to the ratepayers to pay to the officer in kind. There would be considerable danger in holding that a corporation was at liberty to add from time to time under the name of an allowance a sum of money to the salary of its officer, on the ground that his duties had turned out more onerous than they were expected to be at the time when the salary was fixed. One can easily see how great an amount of jobbery that might lead to. It would destroy the independence of the officer, who would be tempted to court the favour of members of the corporation, with a view to being able to persuade them from time to time to give him, under the name of an allowance for extra work, a present of money which would come not out of their own pockets but out of those of the ratepayers. I should therefore require further consideration before I could satisfy myself that these payments to Barley could in any case have been made to him as an allowance under the Act.

But, even assuming that they could, I think that that argument ought not to influence our judgment, and for two reasons. In the first place it is impossible for the Court to ascertain whether the sums paid to the surveyor were not in excess of what was a fair and reasonable remuneration for the extra duties which he was called upon to discharge, it has no means of deciding such a question. In the second place there seems to be no limit to the number of occasions on which the argument may be used. If on every occasion on which an illegal payment has been made we are to refuse to issue a certiorari on the ground that the payment might have been made in another form, the words of s. 193 might as well be struck out of the Act. We have recently seen the Courts going a considerable length in the direction of excusing breaches of an Act of Parliament committed by candidates for the office of county councillor; but it was expressly pointed out that the applications for relief

against the consequences of those breaches were only granted upon the grounds that the Act in question was a new one, and that its provisions were obscure, and it was intimated that similar applications would not be indefinitely granted in the future. But here we are dealing with an Act which was passed fourteen years ago, and with a section the provisions of which have been already explained in more than one decided case.

I think therefore that if we were to exercise our discretion in the manner in which we are invited to exercise it, and refuse to quash these orders, we should not be putting a reasonable interpretation on the term "discretion,"—that in fact we should not be exercising a judicial discretion at all.

With regard to the order for the payment to Mr. Barley of his costs of defending the action for penalties, I cannot understand how such an order could possibly be supported. If the payment were to be allowed the result would be this, that the ratepayers would be in a worse position than if they had never taken any steps at all to protect themselves against Barley's infringement of the Act of Parliament, for they would have to pay the commission and the costs into the bargain. In my judgment the writ of certiorari must go.

Rule absolute.

Solicitors for the Prosecutor: *Kingsford, Dorman & Co., for Walter Hills, Margate.*

Solicitors for Defendants: *Merediths, Roberts & Mills, for W. A. Hubbard, Ramsgate.*

J. F. C.

1889
May 14.

IN RE LANE. EX PARTE GAZE.

Bankruptcy—Debt barred by Statute of Limitations—Part-payment for Purpose of renewing Liability—Fraudulent Preference—46 & 47 Vict. c. 52, s. 4, sub-s. 1 (c), s. 48.

A debtor unable to pay his debts as they became due from his own money paid within three months of his being adjudged bankrupt part of a debt barred by the Statute of Limitations, with the object of renewing the debt and enabling the creditor to prove in the bankruptcy for the balance due. The debt up to the date of such payment on account had always been treated by the debtor and the creditor as a subsisting debt, and one which it was intended should be ultimately paid:—

Held, that there was a sufficient part-payment to take the debt out of the operation of the Statute of Limitations.

Semble, per Field, J. Even if the money so paid on account could be recovered back on the ground that the payment was pro tanto a fraudulent preference, that would not prevent the payment from having the effect of reviving the debt.

APPEAL by the trustee in bankruptcy against the order of a county court judge ordering him to admit certain proofs by the respondents against the bankrupt's estate.

By the will of one William Lane, who died in 1862, a sum of 3000*l.* was left to trustees upon trust to pay the interest to his daughter, Susannah Frampton, and her husband, John Frampton, for their lives, and after the death of the survivor of them to divide the capital amongst their children. Susannah Frampton died in 1870, leaving a son, William, and a daughter, Delicia, who was married to Lancelot Lane, the bankrupt. In the year 1876, the bankrupt being in want of money, an arrangement was made by which the trustees of the settlement were released from the trust; the stock in which the 3000*l.* was invested was sold, and the sum realized by the sale, 2958*l.* 11*s.*, was lent to the bankrupt upon the terms of his paying 4 per cent. interest upon it. He continued to pay such interest down to 1879. Since that date no interest was paid, but the parties always treated the loan as a subsisting debt, and as one which it was intended on both sides should be paid. In January, 1888, the bankrupt, fearing that the result of litigation in which he was engaged would be adverse to him, and that he might become a bankrupt,

sent to John Frampton 5*l.*, with a letter, in which he stated, as was the fact, that his object in sending the money was to prevent any question of the Statute of Limitations being raised by his trustee in bankruptcy. The terms of such letter, however, were not such as to amount to a sufficient acknowledgment of the debt to take the case out of the statute. In February, 1888, a receiving order was made against the bankrupt, and proofs were tendered against his estate by John Frampton in respect of his life interest, and by William Frampton and Delicia Lane in respect of their reversionary interest in the sum of 2958*l.* 11*s.* lent by them to the bankrupt. The trustee rejected the proofs on the grounds that they were barred by the Statute of Limitations. On appeal the county court judge held that the claim was not barred, and ordered the proofs to be admitted for such sums as the registrar should find the life interest and reversions respectively to be worth.

The trustee appealed.

R. Vaughan Williams, Q.C. (*Poyser*, with him), for the appellant. The payment by the debtor of 5*l.* on account of the debt of 2958*l.* 11*s.*, which was already statute-barred at the time of the payment made, was ineffectual to revive the debt.

In the first place it was a fraudulent preference under s. 48 of the Bankruptcy Act, 1883 (1), to the extent of 5*l.*, for the respondents thereby had that portion of their debt paid in full, and to that extent were placed in a better position than the other creditors. But a fraudulent preference is now by s. 4, sub-s. 1 (*c*), an act of bankruptcy, so that the bankruptcy relates back to the date of the payment.

Secondly, assuming that the payment was not a fraudulent preference, still, being made for the purpose of reviving a debt which the debtor was under no legal obligation to pay, it was an

(1) By s. 48, sub-s. (1), of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): "Every payment made, every obligation incurred . . . by any person unable to pay his debts as they become due from his own money in favour of any creditor . . . with a view of giving such creditor a preference over the other creditors shall, if the person making . . . or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making . . . or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy."

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"obligation incurred . . . . in favour of a creditor" within the meaning of s. 48, and as such was fraudulent and void.

Yate Lee, for the respondents, was not called upon.

FIELD, J. I am of opinion that this appeal should be dismissed. It is not disputed that the debt due to the respondents was, at the date of the payment of the 5*l.*, statute-barred, but they contend that the payment, being made on account of the larger sum, sufficed to take the case out of the statute. A question might have arisen whether this transaction was not a mere pretence, but there was no evidence that it was. The debt was one which was honestly due; which the debtor was morally bound to pay, and both he and the respondents had always looked upon it in that light. The debtor always intended to pay it if and when he could, and the respondents never intended to forego their claim upon him. Under these circumstances the question is whether the payment of the 5*l.* was sufficient to revive the debt. It is said on behalf of the trustee that it ought not to have that effect because it is void as a fraudulent preference under s. 48 of the Bankruptcy Act, 1883. No doubt this was a payment made in favour of a creditor by a person unable to pay his debts as they became due from his own money, and no doubt the person paying it was adjudged bankrupt on a bankruptcy petition presented within three months after the date of such payment, but the question is whether it was with intent to give such creditor a preference over the other creditors. If this had been a payment of 1000*l.*, or any other large sum, there would have been strong evidence of an intention to prefer. But here it is clear that there was no such intention. The only intention that the debtor had was to provide a legal remedy for the recovery of the debt. Then is a payment made with that object fraudulent and void as against the trustee? The legislature has not made it so. I think, therefore, that the county court judge was right, and that the payment had the effect of reviving the debt.

Even if the payment of the 5*l.* amounted to a fraudulent preference, so that the 5*l.* itself could be recovered back by the trustee, I am not at all clear that the payment of it would not still have the effect of taking the case out of the statute.

CAVE, J. I am of the same opinion. It has been contended that this payment of 5*l.* was a payment by way of fraudulent preference within s. 48 of the Bankruptcy Act. In order to test the correctness of that contention let us suppose that a motion had been made to the Court for an order on J. Frampton to repay that sum, and consider what would have been the result of such a motion. No doubt by the payment of the 5*l.* Frampton was placed in a different position from that of the other creditors; for, as to 5*l.*, portion of the debt due to him, he was paid in full, whereas the other creditors did not in respect of any portion of the debts due to them get more than a dividend. But it is not enough that this particular creditor should have been in fact preferred. It has been held over and over again that the payment must have been made with intent to prefer. Thus in *Ex parte Taylor, In re Goldsmid* (1), where a man on the verge of bankruptcy paid a sum of money to a creditor whom he had defrauded, doing so, not with the view of preferring such creditor, but with the view of saving himself from exposure or criminal prosecution, the Court of Appeal held that such payment was not a fraudulent preference within the meaning of the section. So again in *Re Mills, Ex parte the Official Receiver* (2), where the debtor on the verge of bankruptcy paid a sum of money to a creditor, not with the object of benefiting that creditor, but with the object of relieving the debtor's surety who was not a creditor of the debtor at all, it was held that the payment was not a fraudulent preference.

As therefore in the present case the intention was not to prefer the respondents, but merely to revive the debt, a motion for the repayment of the 5*l.* would have been refused, and the payment would have stood good.

But that does not conclude the case. It is not under all circumstances that a payment of a sum of money, made on the eve of bankruptcy for the purpose of reviving a debt which is barred by the Statute of Limitations, will be effectual to do so. In order to prevent a payment from having that effect it must be established that it was fraudulently made with the object of setting up a debt which had been treated by all parties, debtor

(1) 18 Q. B. D. 295. (2) 58 L. T. (N.S.) 871.

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and creditor alike, as dead and gone. If a debtor on the eve of bankruptcy were to say to himself "I never meant to pay this person, and he never expected that I should; but, now that my property is going to be divided among my creditors, he may as well have a share with the rest," and under those circumstances were to make a payment with the view of reviving the debt, I have no hesitation in saying that such a revival of the debt could not prevail against the other creditors. But that would be on grounds altogether outside s. 48; for I do not think that that section has any application to a case of that kind.

On the other hand where there is a debt which has been treated all along as a good debt, but which the creditor, because of the relationship, has not pressed for, knowing perfectly well that the debtor would never set up the Statute of Limitations against him, and, the time having come when the power of saying whether the statute should be set up as a defence is about to pass away from the debtor to another person who would take a different view of the matter, the debtor, feeling himself under a moral obligation to do so, makes a payment on account of the debt for the express purpose of giving the creditor the legal rights which it was never intended he should be deprived of, I say that such a payment is not fraudulent, and ought to be supported. I think therefore that the order of the county court judge was correct, and that the appeal should be dismissed.

Appeal dismissed; leave to appeal refused.

Solicitor for appellant: *C. F. Martelli, for Bavin & Daynes, Norwich.*

Solicitors for respondents: *Storey & Cowland, for S. Lynay & Co., Norwich.*

J. F. C.

[IN THE COURT OF APPEAL.]

1889
May 16.

BERESFORD-HOPE, PETITIONER; LADY SANDHURST, RESPONDENT.

County Council—Election as Member—Disqualification of Women—Votes thrown away—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 11, *sub-s.* 3, *s.* 63—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 2.

At an election of members of a county council under the Local Government Act, 1888, the respondent obtained a majority of votes over the petitioner and was declared to be elected. On a petition claiming the seat on the ground that the respondent, being a woman, was disqualified:—

Held, that an appeal lies in such case, by special leave, from the Divisional Court to the Court of Appeal:—

Held also (affirming the judgment of the Queen's Bench Division) that women are incapacitated from being elected members of a county council:—

Held further, that the votes given to the respondent were thrown away and that the petitioner was duly elected.

SPECIAL CASE stated, under the Municipal Corporations Act, 1882, pursuant to an order of the Queen's Bench Division.

1. The election of councillors for the Brixton division of the administrative county of London is an election to which the Local Government Act, 1888, and the Acts incorporated therewith, apply.

2. On January 17, 1889, an election was held to elect two councillors for the Brixton division.

3. Edward Hope Verney, Henry Smallman, the petitioner, and Stephen Seaward Tayler were, on January 8, 1889, duly nominated as candidates for the office of councillor, and were in all respects duly qualified to be elected, but S. S. Tayler's nomination was subsequently withdrawn.

4. The respondent was also nominated as a candidate for the office. Such nomination was objected to by Henry Smallman and by the petitioner severally, by notices in writing delivered to the deputy returning officer on their behalf on January 10, 1889, as not being a valid nomination, on the ground that the respondent was a woman, and was therefore disqualified for election. These objections were disallowed by the deputy returning officer on the same day.

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5. E. H. Verney, H. Smallman, the petitioner, and the respondent, were candidates at the election. E. H. Verney polled 2112 votes; the respondent polled 1986 votes; the petitioner polled 1686 votes, and H. Smallman polled 1397 votes; and E. H. Verney and the respondent were declared to be elected.

6. The petitioner, on January 25, 1889, presented a petition to the High Court of Justice praying that it might be determined that the election of the respondent was and is void, and, further, that it might be determined and declared that the petitioner was duly elected, and ought to have been returned.

7. The respondent is a woman, and is a person entitled by virtue of the Local Government Act, 1888, and the Acts incorporated therewith, to vote at an election of councillors for the administrative county of London, and is duly registered accordingly in respect of her residence at No. 18, Portland Place, W.

8. The fact of the respondent being a woman was a matter of notoriety in the Brixton division, and the fact that objections to her nomination as a candidate on the ground of her being a woman had been made and disallowed on January 10 was published in certain newspapers circulating in that division previous to the day of polling.

9. The question whether women entitled to vote at an election of county councillors under the Local Government Act, 1888, were or were not qualified to be elected as county councillors was publicly raised in certain newspapers circulating in the division as a disputed question of law previous to the day of polling.

10. Assuming that the votes given for the respondent were, under the circumstances in the preceding paragraphs mentioned, thrown away, then the petitioner polled the highest number of lawful votes at the election next after E. H. Verney.

The questions for the consideration of the High Court are:—

1. Whether, upon the facts above stated, the respondent was a person fit and qualified to be elected and to be a councillor within the meaning of the Local Government Act, 1888, and the Acts incorporated therewith.

2. Whether, upon the facts above stated, the votes given for the respondent were thrown away.

If the first question is answered in the affirmative, the petition is to be dismissed.

If the first question is answered in the negative, and the second in the affirmative, then the petition is to be allowed, and its prayer granted.

If both questions are answered in the negative, the election of the respondent is to be declared null and void.

1889. March 18. *Finlay, Q.C.* (*S. H. Day*, with him), for the petitioner.

R. T. Reid, Q.C. (*Costelloe*, with him), for the respondent.

The arguments are sufficiently stated in the judgment of the Court.

Cur. adv. vult.

1889. April 13. The judgment of the Court (Huddleston, B., and Stephen, J.), was read by

STEPHEN, J. The question in this case is whether a woman is capable of being elected as a member of a county council.

This depends on the construction of several Acts of Parliament which are connected together by references to them in the Local Government Act of 1888. The second section of that Act provides that the council of a county shall be constituted in like manner as the council of a borough divided into wards. The Municipal Corporations Act of 1882, s. 11, sub-s. 1, enacts that the councillors shall be fit persons elected by the burgesses. The qualifications of burgesses are contained in the Municipal Corporations Act of 1882, as varied by the Local Government Act of 1888, s. 2. Only one is material to the present question. It is thus stated in the Municipal Corporations Act of 1882, s. 11, sub-s. 2: "A person shall not be qualified to be elected or to be a councillor, unless he is enrolled and entitled to be enrolled as a burgess." In order to be a burgess it was originally, by 5 & 6 Wm. 4, c. 76, s. 9 (the Municipal Corporations Act of 1835), necessary to be "a male person of full age," but this section was repealed by the Act of 1869, 32 & 33 Vict. c. 55, s. 1, which re-enacted it, with variations, the word "male" being omitted before "person," and it being enacted, by s. 9, that "in

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this Act and the said recited Act of the 5 & 6 Wm. 4, c. 76, wherever words occur which import the masculine gender, the same shall be held to include females for all purposes connected with and having reference to the right to vote on the election of councillors, auditors, and assessors." A very similar section is contained in the Municipal Corporations Act of 1882, s. 63: "For all purposes connected with and having reference to the right to vote at municipal elections words in this Act importing the masculine gender include women."

An argument was somewhat slightly raised before us on s. 11, sub-s. 3, of the Municipal Corporations Act, 1882, which enacts that "every person shall be qualified to be elected and to be a councillor who is, at the time of election, qualified to elect to the office of councillor;" and it is said, being on the burgess roll, Lady Sandhurst is entitled to vote for councillors, therefore she is entitled to be one.

This enactment has been construed in *Flintham* v. *Roxburgh.* (1) It was there held that "qualified to elect" is not equivalent to "entitled to vote," and one of the arguments which weighed with the Court was that from the interpretation then contended for, it would follow, "that women would be entitled to be elected to the office of town councillor, because they have a right to vote. But it is clear they are not so entitled." (2) As for the contention that the Act of 1869 extends to the removal of the disqualification of women it is enough to say that no instance since 1869 of a woman holding a high municipal office has been produced, and this is a contemporary exposition of the statute to which we think weight attaches.

The question of Lady Sandhurst's qualification turns upon the construction of these statutes.

It was argued against Lady Sandhurst's qualification that the result of the various enactments is that women may be on the burgess roll, and may as such vote at municipal elections, but that there is no express enactment which makes women eligible for the various offices created by the Local Government Act of 1888.

This appears to us to be undeniably true. Indeed no argu-

(1) 17 Q. B. D. 44. (2) Judgment of Mathew, J., at p. 47.

ment of much weight was urged against it. Mr. Reid's main argument was that there was no express enactment unfavourable to Lady Sandhurst's claim; that women were prevented from holding municipal offices, not as women, but as persons who could not be burgesses, that the Act of 1869 relieved them from this disability, and that there were no other enactments on the subject sufficient to disentitle them to hold such offices. The members of the municipal councils must, it is said, be "fit persons of full age" possessing certain qualifications. Can it be said that a woman possessing such qualifications cannot be a fit person? In short the whole question was put as follows: The words of the various parliamentary enactments being inconclusive, the presumption is against exclusion.

We cannot agree with this view. An authority appears to us to be furnished by the case of *Chorlton* v. *Lings* (1) which decides the question. This case decided that under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102) women were not authorized to vote, and that they did not possess the right to vote before the Act was passed. We need not quote or refer to the whole of the case, but each of the four judges who decided it put his decision amongst other grounds upon the principle that women were legally incapacitated to vote, and that this appeared from uninterrupted usage for many centuries. Bovill, C.J., says (at p. 385): "Women are legally incapacitated from voting." Willes, J., says (p. 388): "Women are under a legal incapacity to vote at elections." Byles, J., agrees (p. 394), and Keating, J., says the same (pp. 395, 396). A few words in Mr. Justice Willes's judgment (p. 389) are peculiarly important in reference to this case:—"In the cases of Constable and Sheriff, which latter is the highest authority produced by the appellant for the exercise of public functions by a woman, the reason given in the authority referred to as to the Constable was that she could appoint a deputy; . . . and in the solitary and exceptional case of the Shrievalty of Westmoreland, Ann, Countess of Pembroke, took by descent, . . . an office which could have been and usually is discharged by deputy."

The importance of this is that in this case the question is as

(1) Law Rep. 4 C. P. 374.

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to the eligibility of a lady to a newly created municipal office of great and general importance. If, for the sake of argument, it were admitted that the language of the Act was ambiguous, the passage quoted, which states a fact undoubtedly and notoriously true, would be enough to make us feel that, if it is intended that women should be eligible for such offices as these, an exception would be made in a general rule of long standing, and such an exception ought to be made in perfectly plain language. For these reasons we think that Lady Sandhurst's election was void.

A second question in the case is whether the votes for Lady Sandhurst were thrown away, so that Mr. Beresford-Hope was duly elected, or must there be a new election?

The following facts were proved to us upon this subject. In the first place it was admitted that all those who voted for Lady Sandhurst knew that she was a woman. In the second place it was shewn to our satisfaction that the question whether as a woman she was incapacitated from election was a subject of common public discussion at the time and place of her election. It was not proved specifically that notice was given to the individual voters. We think, however, that it must be taken that the fact which, if we are right, constituted the disqualification was known to all, and that the voters were also aware that the legal consequence might, though they may not have been aware that it actually did, constitute disqualification. The question whether in such a case the voters voted at their peril, or whether there should be a new election, is not altogether clear. The general principle is laid down in the case of *Gosling* v. *Veley* (1), and is there stated as follows:—"Where the majority of electors vote for a disqualified person in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, may be capable of being made good, according to the nature of the disqualification. The objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available; or it may be such as to place the elected candidate on the same footing as if he never had existed and the votes for him were a nullity." To this general principle the

(1) 7 Q. B. 406.

judgment proceeds to add an illustration so apposite to the present case that in quoting it we wish distinctly to state that we do not regard it as more than a singularly pointed illustration: "But, if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given: no one can doubt that, if an elector would nominate and vote only for a woman to fill the office of mayor or burgess in Parliament, his vote would be thrown away: there the fact would be notorious, and every man would be presumed to know the law upon that fact."

This case has been to some extent departed from in the case of *Reg.* v. *Mayor of Tewkesbury* (1), decided in 1868. The effect of this case is not unfairly represented by saying that a vote is not to be taken to be thrown away because the voter knows of a disqualifying fact, but does not know that it is by law disqualifying. This decision, however, appears to have been discredited to some extent by *Drinkwater* v. *Deakin* (2), decided in 1874, in which the present Master of the Rolls says (p. 642): "When the validity or invalidity of an act depends on a question of law, no one can make such act valid in law when it would otherwise be invalid by saying he did not know the law." Denman, J., agreed in this judgment, and Lord Coleridge said (p. 641): "I entirely agree . . . in the general law laid down as to the throwing away of votes in the judgment in *Gosling* v. *Veley*." (3) *Etherington* v. *Wilson* (4) is a further authority on this subject.

Upon these grounds we think that the votes given for Lady Sandhurst were thrown away, and that Mr. Beresford-Hope was duly elected.

Judgment for the petitioner.
Leave to appeal was given.

W. A.

The respondent appealed.

Finlay, Q.C. (*S. H. Day* with him), for the petitioner. There is a preliminary objection to this appeal. By s. 93, sub-s. 7, of

(1) Law Rep. 3 Q. B. 629.
(2) Law Rep. 9 C. P. 626.
(3) 7 Q. B. 406.
(4) Law Rep. 20 Eq. 606.

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the Municipal Corporations Act, 1882 (1), where the question raised by the petition is stated in the form of a special case the decision of the High Court is final. The case of *Line* v. *Warren* (2) does not amount to an express decision to the contrary, although the Court consented to hear the appeal.

Rigby, Q.C. (*R. T. Reid, Q.C.*, and *Costelloe*, with him), for the respondent. The effect of s. 242, sub-s. 3, of the Municipal Corporations Act, 1882 (3), regard being had to other statutes expressly or impliedly brought into that Act, is to give an appeal to the Court of Appeal in cases where special leave has been given by the High Court. By s. 15, sub-s. 6, of the Corrupt Practices (Municipal Elections) Act, 1872 (4), the decision of the Superior Court (now the High Court) upon a special case was made final, and it remained so down to 1881. By s. 14 of the Judicature Act, 1881 (5), the policy of substituting an appeal by special leave of the High Court for the absolute finality of the decision of the High Court was extended to the Act of 1872, and s. 15, sub-s. 6, of that Act was superseded. This change having been made by the Act of 1881, it is impossible to attribute to the

(1) 45 & 46 Vict. c. 50, s. 93, sub-s. 7, enacts: "If, on the application of any party to a petition made in the prescribed manner to the High Court, it appears to the High Court that the case raised by the petition can be conveniently stated as a special case, the High Court may direct the same to be stated accordingly, and any such special case shall be heard before the High Court, and the decision of the High Court shall be final."

(2) 14 Q. B. D. 548.

(3) 45 & 46 Vict. c. 50, s. 242, sub-s. 3, enacts: "Where any Act passed before this Act, and not specified in the first or in the ninth schedule, refers to the Municipal Corporations Act, 1835, or any Act amending it . . . . the reference shall be deemed to be to this Act or to the corresponding provision of this Act . . . ."

(4) By 35 & 36 Vict. c. 60, s. 15, sub-s. 6, the decision of the "Superior Court" upon a special case was made final, and s. 29 of the same Act repeals three sections of the Municipal Corporations Act, 1835, and the Act is to that extent "an Act amending the Municipal Corporations Act, 1835."

(5) 44 & 45 Vict. c. 68, s. 14: "The jurisdiction of the High Court of Justice to decide questions of law, upon appeal or otherwise, under the . . . . Corrupt Practices (Municipal Elections) Act, 1872 . . . . or any Act amending the same, shall henceforth be final and conclusive, unless in any case it shall seem fit to the said High Court to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive."

legislature an intention to alter the procedure on appeals by the Act of 1882, unless such an intention is clearly expressed. Sect. 242, sub-s. 3, of the Act of 1882 refers to the Act of 1872 (which is an Act amending the Municipal Corporations Act, 1835), and in effect directs that where any previous Act refers to the Act of 1872 "the reference shall be deemed to be to this Act"; the effect of which is that the Judicature Act of 1881, although in terms it refers only to the Act of 1872, is to be deemed also to refer to the Act of 1882. The sub-section amounts to a declaration by the legislature that the Act of 1881 is not to be considered as spent in its operation, but as being re-enacted in this sub-section. The result is either that the Act of 1881 is to be deemed to have been passed immediately after the Act of 1882, or that the Act of 1882 is to be deemed to be substituted for the Act of 1872; in either view the provisions of s. 93, sub-s. 7, of the Act of 1882 are modified by s. 14 of the Act of 1881, and an appeal lies from the High Court by special leave. *Line* v. *Warren* (1) is in point, and is in accordance with the letter and with the entire spirit of the Act.

[He also cited *Crush* v. *Turner*. (2)]

Finlay, Q.C., for the petitioner. The object of the Act of 1882 was to establish a code for the regulation of municipal corporations, and not to legislate merely by reference to former Acts. In establishing this code, the decision of the High Court on a special case was by s. 93, sub-s. 7, made final, and there being this express provision in the Act it cannot be controlled by a general section which incorporates another Act for other purposes. Sect. 242, sub-s. 3, deals with previous Acts "not specified in the first and ninth schedules," and a reference to those schedules will shew that the Judicature Act, 1881, is not ejusdem generis with the Acts with which this section deals, and is not therefore to be treated as being within the scope of or affected by the section. Further, the Act of 1872 is not an Act amending the Municipal Corporations Act, 1835, within the meaning of this section; it only contains a repeal of three sections of the earlier Act, and does not amend it in the ordinary meaning of the word. The intention of the legislature was to

(1) 14 Q. B. D. 548. (2) 3 Ex. D. 303.

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ensure a speedy decision of questions arising on election petitions.

LORD COLERIDGE, C.J. Before the hearing of this appeal on the merits a preliminary question of jurisdiction has been raised on behalf of the respondent, and our first duty is to determine whether we have jurisdiction to hear the appeal. Apart from the previous decision of this Court in *Line* v. *Warren* (1), I am, in consequence of the argument addressed to us to-day, clearly of opinion that we have jurisdiction. The Judicature Act made certain provisions as to the distinction between this Court and the High Court, and as to the circumstances in which an appeal would lie from the latter to this Court: but these it is not material for me to consider, for my decision turns on the Acts of 1872, 1881, and 1882. The Act of 1872 was a municipal Act, making provision for the prevention of corrupt practices at municipal elections, and s. 15, sub-s. 6, of that Act made the determination of the Superior Court (now called the High Court) upon special cases stated under that Act final. So matters remained down to 1881, in which year was passed an Act amending the Judicature Act; this Act, the Supreme Court of Judicature Act, 1881, did not directly deal with municipal elections, but by s. 14 they all were indirectly affected. By that section the final decision of the High Court was made subject to appeal in cases where special leave to appeal might be given. That was the law in 1881, and in 1882 an Act was passed which for all substantial purposes is the same as the Act of 1888, upon which technically our decision is given. Sect. 93 deals with the trial of municipal election petitions and with the decision of special cases relating thereto, and by sub-s. 7 the decision of the High Court upon a special case is undoubtedly made final. But by s. 242 it is enacted in effect that when, in any prior Act of Parliament, the Act of 1872 was referred to the Act of 1882 should be meant, and as the Act of 1881 had annexed, as a condition to the finality of the decision of the High Court, the provision that it should be final unless special leave to appeal were given, s. 242 has in effect made the same provision in regard to s. 93; it has

(1) 14 Q. B. D. 548.

incorporated the Act of 1881 with that of 1882, and has made it act upon the Act of 1882 as it did upon that of 1872. The result is that upon the true construction of these sections the decision of the High Court is not final if it gives special leave to appeal. I do not forget the case of *Line* v. *Warren* (1), which has been cited to us. We are all of opinion that that case was rightly decided; and I may add that although the judgment given was short, the case was fully argued and most carefully considered by the Court. I am therefore of opinion that we have jurisdiction to hear this appeal; while as a question of expediency, although I pay no attention to that consideration, I think that it is most expedient that the law should be what it is.

LORD ESHER, M.R. I am of the same opinion, and am satisfied that the decision in *Line* v. *Warren* (1) was absolutely correct.

COTTON, LINDLEY, FRY, and LOPES, L.JJ., concurred.

W. J. B.

Rigby, Q.C., and *Costelloe* (*R. T. Reid, Q.C.*, with them), in support of the appeal. Throughout the Municipal Corporations Act, 1882, there are provisions in which it is absolutely necessary to read the pronoun "he" as including women, as for instance, in s. 32 as to rating, and s. 33 as to qualification; in the provisions as to corrupt practices and the employment of paid agents and canvassers, and in all the clauses as to election petitions in which the pronoun occurs. There is nothing at common law to prevent women becoming corporators, and although the Act of 1835 excluded women altogether, since 1869 they have had a right to vote at municipal elections, and are therefore qualified to elect to the office of councillor. Sect. 63 of the Municipal Corporations Act, 1882, does not restrict this right, but is a declaration in a consolidating Act that women are included in it not merely as having a bare right to vote, but for all purposes connected with that right. They are, therefore, persons qualified to elect to the office of councillor, and by virtue of s. 11, sub-s. 3, to be elected to that office. [They referred to *Flintham*

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v. *Roxburgh* (1); and as to the claim to the seat to *Reg.* v. *Mayor of Tewkesbury* (2), *Reg.* v. *Bester.* (3)]

Finlay, Q.C. (*S. H. Day,* with him,) for the petitioner, was not called on to argue the first point. The Court under s. 100, sub-s 4, of the Act of 1882 has the same power as if the petition were an ordinary action, and may therefore draw inferences of fact. From the 8th and 9th paragraphs of the special case it should be inferred that those who voted for the respondent did so as an experiment, and knew that their votes would be thrown away. At any rate if the electors knew the facts they must be taken to know the law deducible from them. As the law attaches the disqualification the votes were thrown away, and the petitioner is entitled to the seat.

[He cited *Borough of Clitheroe* (4); *Gosling* v. *Veley* (5); *Drinkwater* v. *Deakin.* (6)]

Rigby, Q.C., in reply. Under the parliamentary law applicable to such a case in order that votes may be thrown away there must be some perverseness on the part of the voters voting for the disqualified person. Here there was none, for the objection was overruled, and it would appear to the voters that they might properly vote for the respondent.

LORD COLERIDGE, C.J. This case comes before us upon appeal from a decision of my brothers Huddleston and Stephen in the Court below, that, under the circumstances which I will very shortly mention, the respondent in this appeal is entitled to the seat for the county council, in the contest for which he received a minority of votes, on the ground that the candidate who received the majority of votes was incapacitated by law from being a candidate for the office of county councillor, and that votes given for her were thrown away, and the ground upon which she was incapacitated, is, that she was a lady.

If this were a question of common law, or a question about a variety of statutes, I should have thought that it might be a matter in which it would be advisable to take time before

(1) 17 Q. B. D. 44.
(2) Law Rep. 3 Q. B. 629.
(3) 3 L. T. (N.S.) 667.
(4) 2 Power, R. & D. 276.
(5) 7 Q. B. 406.
(6) Law Rep. 9 C. P. 626.

pronouncing our judgments, but it does not appear to me to be a question of that sort, but one to be determined upon a few and very simple considerations.

This is a new office created in 1888 by statute: it is an office therefore, which no one, apart from the enactments of the statute has an inherent or common law right of holding, and the right of any one to hold the office must be found within the four corners of the statute which creates the office, and enacts the conditions upon which it is to be held, and the persons who are to be entitled to hold it.

It is quite plain that down to 1888 no woman had ever sat in a municipal corporation, the qualifications for which, and the laws applying to which, are expressly by the Act of 1888 made applicable to the new body, the county council, which was thereby created. We are, therefore, thrown back upon the Municipal Corporations Act of 1882, which is the Act containing the law and the qualifications, according to which we are bound to lay down the law as to county councillors, and the qualifications necessary for that office. I have said already that at common law no one would have any right to an office which is only just now created. I have said also that as a member of a town council, alderman, mayor, and so forth, under the Municipal Corporations Act, 1882, it is conceded that no woman had ever sat. But, it is said, that on the true effect of the words of the Act of 1882, the statute, as properly interpreted, has given a right to women to sit in these municipal corporations, and therefore, as a consequence, in the county council.

I quite admit that from 1869 (the time at which a particular franchise was given, and of which a word in a moment), down to 1889, is too short a time to give rise to what is called contemporanea expositio, and to fix beyond dispute a meaning upon words which might be doubtful in themselves, yet, it is not a matter altogether to be left out of sight in construing these statutes, that the right of voting (from which it is said the consequence that they may be elected follows) was distinctly given to women by the Act of 1869. It is not also perhaps to be entirely left out of sight, that in the twenty years which have run since 1869, the questions of the rights and privileges of women have not

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been, as in former times they were, asleep. On the contrary, we know as a matter of fact that the rights of women, and the privileges of women, have been much discussed, and able and acute minds have been much exercised as to what privileges ought to be conceded to woman. That has been going on, and surely it is a significant fact, that never from 1869 to the present hour has any woman, I do not know whether one has ever been a candidate, but certainly never has any woman ever sat in a municipal corporation. It is said that, notwithstanding that fact, women have been qualified from 1869 to sit in municipal corporations, and therefore that they now are entitled to sit in county councils. That is founded upon one or two sections which, but for a reason which I will give in a moment, would, I own, in my mind, have raised a considerable case in support of this claim. The right of women to vote in municipal elections was given in 1869, and has been exercised without opposition ever since, and by the 11th section of the Act of 1882 it is enacted for the first time, or, if not for the first time, the absence of any attempt to take advantage of it becomes still more significant—it is enacted that every person shall be qualified to be elected and to be a councillor who is at the time of the election qualified to elect to the office of councillor.

It is said, as it is clear that women can elect to the office of county councillor, this enactment qualifies them to be elected and to be county councillors. If that argument stood alone, I cannot deny that, in my mind, there would be a very strong case, It is true that the words used are all of the masculine gender. but as up to that time women had had the power of electing, and although the Act of 1869 was swept away and the privileges granted under it passed away with its repeal, yet nevertheless exactly analogous advantages and privileges were created by the Act of 1882, and as there is nothing to restrain the generality of the language, there would in my opinion be much to be said in favour of applying the language of Lord Brougham's Act, and holding that as a woman was qualified to elect, so, although the masculine gender is used, she would be qualified also to be elected. Unfortunately for that argument, which by itself would be strong, there is the 63rd section, which appears to me to be

conclusive of the question. That section (which is a very short one and a very plain one) enacts that, "for all purposes connected with and having reference to the right to vote at municipal elections, words in this Act importing the masculine gender include women." I asked Mr. Rigby what was the use of that section if his argument was correct, that, taking Lord Brougham's Act with the Municipal Corporations Act of 1882, women had already the power, not only of being on the burgess list and voting, but of being elected. To that question it seems to me that no answer was given because none could be given. If the Act be looked at it appears reasonably clear that after going through a number of matters which are more or less connected with voting—the creation of the burgess lists, the preparation of them, and a variety of other things, in all of which as incident to the right to vote undoubtedly women are included and have the same privileges as men—after all these comes the 63rd section and says in effect, "As regards women, although the words have been general hitherto, their right is limited to the right to vote, and does not include the right to be elected." But then it is said that there are other matters in the Act—the criminal clauses, clauses relating to taxation, and other clauses of various kinds, in which, to give reasonable effect to the Act, the rule as to the inclusion of the feminine gender where the masculine is used must be adopted. The principle is familiar to every lawyer, but it must be used to conform to the Act and not to do violence to it or to introduce a consequence which, if the history of the matter is looked at, it is clear was never contemplated. To do otherwise would be to strike out from the Act the 63rd section, which must have been put deliberately into the Act, and for the existence of which in the Act no reasonable ground can be suggested, if it is not to have the interpretation that I am now giving it. That seems to me to dispose of the question as to the right of Lady Sandhurst to sit as a county councillor.

Then comes the second question, whether the result of unseating the respondent is to seat the appellant, although he had the minority of votes against her.

Now that is a matter which has been disputed upon two grounds.

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First of all, it has been said, that having the right to draw inferences of fact, we must draw the inference that everybody who voted for Lady Sandhurst was aware of her incapacity, so that their votes were thrown away. I do not think it is necessary to decide that. If it were necessary, I should say that upon the whole we had the power of drawing inferences of fact, but I do not think, for the purpose of this judgment, it is necessary to decide that question, because it appears to me to be undisputed, and the facts of the case are sufficient to shew, that the incapacity was an incapacity of status. The fact from which the incapacity arose must have been known to every one who voted for Lady Sandhurst; therefore every one voted at his peril, because there existed that fact to which the law annexes the incapacity of being elected. I apprehend that both in *Gosling* v. *Veley* (1) and in *Drinkwater* v. *Deakin* (2), and in other cases it has been laid down over and over again, that if the fact exists which creates an incapacity, and it is known, and must be known, to those persons who voted for a candidate who is so incapacitated, votes given under those circumstances are thrown away. As it is put in one of the judgments, such votes are fairly enough thrown away, because the persons would not do the only thing they ought to do to give effect to their votes, namely, to vote for a properly qualified candidate. The distinction which is drawn in the case of *Drinkwater* v. *Deakin* (2) and in other cases is not a subtle one, it is a perfectly plain one. Where the incapacity is an incapacity of status so annexed by law to the candidate it requires no *proof; the fact of its being* an incapacity to which the law annexes the legal consequence is known to every person who votes, and the persons who vote and who are aware of the fact to which incapacity is attached, must in reason be held to be aware of the consequence which attaches to their voting. The case of *Drinkwater* v. *Deakin* (2), and other cases of the same kind are cases where the fact of incapacity had to be ascertained. In the case of *Drinkwater* v. *Deakin* (2) the fact of the incapacity was not, in the judgment of the Court, ascertained. In that case it was held that there must be sufficient and conclusive notice given to a sufficient number of people to invalidate the election and to seat

(1) 7 Q. B. 406. (2) Law Rep. 9 C. P. 626.

the rival candidate. On that case I decide without hesitation, that the votes given for Lady Sandhurst were thrown away. I accept to the fullest degree the conclusions of the Clitheroe Committee. I thought in the course of the argument, and think still, that the conclusions of the Clitheroe Committee are binding upon us, and as regards the statement of that conclusion, or the reasons given for it, the law has been stated by judges of great authority in almost the same language time after time.

I think therefore that for these reasons, and upon those authorities which I have alluded to, the votes given for Lady Sandhurst were thrown away, and that the petitioner is entitled to the seat.

LORD ESHER, M.R. As with regard to some of the steps which lead me to the same conclusion, I have, I believe, a stronger view than some of my brethren, I desire to state my view of each step.

The right of Lady Sandhurst to be elected as a county councillor must depend upon whether some Act of Parliament has given her that position. The Act of Parliament which determines the matter is, no doubt, the Act of 1888, but that incorporates the Act of 1882, and the real question therefore is, what is the true construction of that Act. It begins by repealing all the former Acts with regard to similar subjects, and starts therefore as perfectly new.

I take the first proposition to be that laid down by Willes, J., in the case of *Chorlton* v. *Lings*. (1) I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public function.

Willes, J., stated so in that case, and a more learned judge never lived. He took notice of the case of the Countess of Pembroke, in the county of Westmoreland, who was hereditary sheriff, which he says was an exceptional case. The cases of an overseer and of a constable were before him, and what I deduce from his judgment is, that for such somewhat obscure offices as those, exercised often in a remote part of the country, where nobody else could have been found who could exercise them,

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women had been admitted into them by way of exception, and that striking out those exceptions, the act of voting in such matters being a public function, primâ facie, and according to constitutional and common law, a woman cannot exercise it.

But that case goes further. It says that, this being the common law of England, when you have a statute which deals with the exercise of public functions, unless that statute expressly gives power to women to exercise them, it is to be taken that the true construction is, that the powers given are confined to men, and that Lord Brougham's Act does not apply.

Now, bringing those considerations to bear upon the statute of 1882, even if there had been no section such as s. 63 in it, I should have been prepared to construe it thus. Sect. 9 states who are to exercise the public function of voting. On the strict construction of the statute, that means men only. Sect. 11, no doubt, states that those who had the power of voting or electing may be elected councillors. But so far, if those who are to elect are confined to men, then s. 11 is confined to men too. If, therefore, there had not been s. 63, I should, construing that Act according to those views, have come to the conclusion that it had not been made out that women were intended to be either electors or elected. But before that statute was passed there had been other statutes relating to municipal franchise, saying who should be electors, and the statute of 1869 had a clause in it, the 9th, which is equivalent to s. 63 in this Act. If, therefore, this Act had been left without s. 63 and had been construed in the way that I should have construed it, it would have altered the law. But the legislature did not intend to alter the law, they only intended to bring the whole law into one statute. They had to guard against the idea of an alteration and to give evidence that notwithstanding the words of ss. 9 and 11 they intended to give women the same right which they had before. That is to be found in s. 63; not that s. 63 is the one that gives the right, but it is a section which shews what is the intention as to the ss. 9 and 11 respecting women.

It shews by necessary implication, as it seems to me, that it was intended to say "by ss. 9 and 11 we do not mean to give women all rights with regard to these public functions, but we

do mean those sections to give them a limited right. What is that? A right to vote at the elections, and no other right. The implication in s. 63 seems to me to be irresistible, and for this simple reason, that if ss. 9 and 11 give the rights that it is argued they did, s. 63 is absolutely futile. The real gist of the matter is, that s. 63 is put into the Act to shew how far the legislature meant ss. 9 and 11 to apply to women. That view of the matter gives full exercise to the authority of the case of *Chorlton* v. *Lings* (1), it gives a full interpretation to the whole of this statute, and it seems to me to determine the question in this case.

As to the second point, I think the case is absolutely determined by the express decision of both the judges who decided the case of *Drinkwater* v. *Deakin*. (2) The words cannot be plainer as used by both, and it would be necessary to overrule that decision unless we hold that all that is necessary to be made known to the electors to determine whether their votes are thrown away or not, is to make out clearly that the facts are known to a sufficient number of them; the facts upon which the law determines that the person for whom they did in fact vote was a person incapable of being elected.

I think, therefore, on both points, the decision of the Divisional Court was right, and that this appeal ought to be dismissed.

COTTON, L.J. I agree with the judgment of the Lord Chief Justice.

The question arises here as to the right to hold the office of county councillor. That is an office which is the entire creation of the Act of 1888, and of course one must look to that Act, and to the Acts incorporated with it, for the purpose of seeing who is qualified to hold that new office which is so created.

In the Act of 1888 there are two rights given, the right to be a county councillor, and the right to vote for a county councillor, and I may say they are the only rights given. There are other matters dealt with, which regulate and qualify the acts of persons who come under that Act, but those are the two rights. One finds in s. 11 of the Act of 1882, which is incorporated by

(1) Law Rep. 4 C. P. 374. (2) Law Rep. 9 C. P. 626.

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reference, who is to be qualified for election as county councillor. In that section there is a personal, pronoun, "he" in s. 11, sub-s. 2. It is said that, introducing Lord Brougham's Act, that would admit women as well as men. But one cannot look to one part only of the Act: one must look to see if there is anything in this Act which shews that that cannot be the proper mode of construing this section. I come then to s. 63. I do not agree with the view which was urged upon us by Mr. Rigby as to the true construction of that section. I think it refers to the right to vote at municipal elections. Now, to my mind, that tends to shew that on the true construction of this Act of Parliament, the right to vote is to be given to women, but the right to be elected is not to be given to women, notwithstanding the words which have been pressed upon us in s. 11. In my opinion that is the true construction, and it depends simply on what is the proper and true construction of this Act, and I do not in any way rely upon the points which have been raised by the Master of the Rolls as regards the general disqualification of women. I rely simply and solely on what I think is the proper and true construction of the Act which creates the office of county councillor. Upon the second point I need add nothing.

LINDLEY, L.J. This case turns on the true construction of ss. 11 and 63 of the Municipal Corporations Act, 1882, and the question is, what rights do they confer upon women? Their right to vote is clear. It is expressly conferred upon them by s. 63. The doubt is, as to their right to sit as county councillors. These sections, if not clearly against the right, yet do not clearly confer it. Before the Act passed it is quite obvious that women had no right to sit as members of a town council. Is that lawful now? Can we say that Parliament has altered this? To my mind the very utmost that can be said is, that there is a doubt about it, and if there is a doubt about it, the law remains unaltered. On the second point I have nothing to add but this, that on considering the earlier cases on that point, I think they are considerably qualified by the late case of *Drinkwater* v. *Deakin*. (1) The facts are told to the elector of the incapacity of

(1) Law Rep. 9 C. P. 626.

being elected on the part of the respondent, I will not say told to him, but he must be taken to know them, and really does know them. The question as to whether he really knows the law on the subject or not is another thing.

FRY, L.J. I am of the same opinion. To my mind the question turns upon the construction of the statute of 1882. I regard the 63rd section as ascertaining, both affirmatively and negatively, the rights which have been conferred upon women; ascertaining them affirmatively by express statement, and ascertaining them negatively by necessary implication. Affirmatively, what is given to them is the right to vote, what is denied them by the necessary implication are all other rights which may be conferred by the statute. I do not regard the negative implication arising from that section as applying to the whole Act, as applying to crimes, or to the obligations, or the duties of witnesses and matters of that description, but I regard it as applying to rights granted by the statute. Then the only inquiry is this, whether the 11th section, which in substance declares that every person qualified to elect is qualified to be elected deals with the right to vote or not. To my mind, it is plain it has nothing to do with the right to vote, but that it has to do with the right to be voted for. That is not within the right given by the 63rd section, but it is within the necessary implication which that section carries with it. With regard to the second point I have nothing to add.

LOPES, L.J. I agree with the other members of the Court as regards the result, but I desire to say this, that I should not be prepared to arrive at this conclusion if it had not been for the 63rd section. I desire to base my judgment upon that section. With regard to the second point, I think the present case is well within the decision in *Drinkwater* v. *Deakin*. (1)

Appeal dismissed.

Solicitors for petitioner: *Walker, Martineau & Co.*
Solicitors for respondent: *Pyke & Minchin.*

(1) Law Rep. 9 C. P. 626.

A. M.

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April 13.

GUYER *v.* THE QUEEN.

Game—Licensed Dealer—Close Time—Possession of foreign Partridges after Expiration of Season—Game Act, 1831 (1 & 2 *Wm.* 4, *c.* 32), *ss.* 3, 4.

A person licensed to deal in game by virtue of the Game Act, 1831 (1 & 2 Wm. 4, c. 32), was convicted under s. 4 of knowingly having in his shop game during the close season, as defined in s. 3.

It appeared that game was exposed for sale in his shop during the close season, but that it had been killed abroad :—

Held, by Lord Coleridge, C.J., and Hawkins, J., (Manisty, J., dissenting,) that the Act did not apply to birds killed abroad, and that the conviction was wrong.

CASE stated by a metropolitan police magistrate,

On March 23, 1888, the appellant, John Guyer, appeared before the magistrate at the Police Court, Westminster, in obedience to a summons.

The charge against the appellant was that he being a person licensed to deal in game within the meaning of 1 & 2 Wm. 4, c. 32, s. 4, did on March 1, 1888, within the district of the said Court unlawfully and knowingly have in his shop certain birds of game, to wit: two partridges, after the expiration of ten days from the day in that year on which it became unlawful to kill or take such birds of game, contrary to the statute.

It was proved that the appellant on March 1, 1888, knowingly had in his shop the two birds hereinafter referred to, exposed for sale, and that he was a person licensed to deal in game within the meaning of the Act above-mentioned.

The two birds were two out of a lot of birds of the same kind which had been purchased by the appellant from a dealer in game, who in his turn had purchased them from an importer of game, who had received a consignment of game from Revel in Russia, sent thence by persons of the name of Mutter & Co., of which consignment the two birds in question constituted a part. It was proved that these birds were imported in a frozen condition and had been killed some time in December last, and that the voyage takes from seven to ten days; the importation of game from Russia during certain times of the year had become a considerable trade.

It was proved to the satisfaction of the magistrate, that the

birds in question were partridges of the same species as the partridges which are found in England and named in the Act.

In February and March, English partridges are, as a rule, thin, while those imported from Russia are in a fair condition; generally speaking Russian partridges are lighter in colour than English partridges. Partridges from different parts of England vary considerably amongst themselves, and the magistrate was not satisfied that Russian partridges could not be matched with English birds. Two witnesses, who were dealers in game, stated that they were able to distinguish Russian partridges from English partridges, and the magistrate thought an expert might possibly be able to do so.

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It was contended on behalf of the prosecution that the Act drew no distinction between birds of English and foreign origin, and between birds killed in England and birds killed abroad.

For the defence, it was alleged that the Act applied to England only; that s. 3, related to killing game in England, and that s. 4 related to the possession of birds killed in England, and did not include Russian game.

The magistrate held that the appellant had committed an offence against the said Act, and that the Act drew no distinction between English and foreign game, and that the words of s. 4, "any bird of game," were general and included all birds of the species named in s. 2. He therefore convicted the appellant.

The question for the opinion of the Court was, whether the magistrate was right in holding that the appellant had committed an offence within s. 4 of the Act.

1889. Feb. 6. *D'Eyncourt*, for the appellant. The conviction was wrong. The title of 1 & 2 Wm. 4, c. 32, is "An Act to amend the Laws in England relative to Game." It is confined to England. It repeals all the previous Acts on the subject, and is the first Act by which dealers in game were required to have a licence.

Sect. 2 defines "game," and includes partridges, and s. 3 prescribes the close times during which game may not be killed. The times specified are different in respect of Somerset and Devon and the New Forest. Sect. 4 imposing a penalty on any

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person licensed under the Act buying, selling, or having in his shop "any bird of game" after the expiration of ten days from the respective days . . . . on which it shall become unlawful to kill or take "such birds of game respectively as aforesaid," refers to the birds and times previously specified; that is to English birds killed in the periods of close time fixed for England. The limit of ten days is evidently the time during which a bird killed in England on the last day of the season might remain fit for food. The respondent relies on *Whitehead* v. *Smithers* (1), where on an information under the Wild Birds' Protection Act, 1876 (39 & 40 Vict. c. 29), the Court held that it was no defence that the birds had been bought or received of or from a person residing out of the United Kingdom. But the nature of the birds protected, the language of the Act, and the object of the legislature were different from those in question. In *Price* v. *Bradley* (2) the Court held that the Fresh-water Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 11, sub-s. 4, which forbids the sale or exposure for sale of fresh-water fish during the close season, applied to eels from Ireland. That case also turned on the construction of a different Act.

Wormald, for the respondent. The conviction was right. The intention of the legislature is shewn by the unrestricted terms of the Act to be that it should include "any bird of game," and the subsequent words "such birds of game respectively as aforesaid" are used simply with reference to the varying periods of close time previously defined. It was not intended that a difficult inquiry as to where the game came from should be necessary. The bird in question was practically indistinguishable from an English partridge. In *Whitehead* v. *Smithers* (1) Lord Coleridge, C.J., said, "It may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter as well as of protecting other British interests is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad:" see also *Taylor* v. *Rogers*. (3)

(1) 2 C. P. D. 553. (2) 16 Q. B. D. 148.
(3) 50 L. J. (M.C.) 132.

R. S. Wright, for the magistrate. 1 & 2 Wm. 4, c. 32, recites and repeals, inter alia, 2 Jac. 1, c. 27, s. 4, which contained an exception of partridges and pheasants "brought from beyond the seas." But 2 Geo. 3, c. 19, s. 1, was a general provision as to buying and selling game in close time, without that exception; and so was 58 Geo. 3, c. 75, s. 1, and in *Helps* v. *Glenister* (1) the Court held that the exception in the statute of 2 Jac. 1, c. 27, s. 4, was not incorporated in the statute 58 Geo. 3, c. 75, and Lord Tenterden (2) said: "The language of the 58 Geo. 3, c. 75, is general, and the exception in the statute 2 Jac. 1, c. 27, seems to be done away with." That decision was in 1828, and the legislature no doubt was aware of it, and yet framed 1 & 2 Wm. 4, c. 32, without any such exception. Sect. 3 of that Act specifies different close times in particular places, and it could not have been intended that persons should inquire where the birds purchased came from. The legislature meant to deal with partridges in general. *Whitehead* v. *Smithers* (3) is in point.

D'Eyncourt, in reply. The earlier statutes referred to did not relate to licensed game-dealers. The appellant, so far as Russian game is concerned, may be regarded as an unlicensed person. Such person may not knowingly have it in his possession after forty days from close time. But forty days from close time, viz., from the 1st of February, had not elapsed in the present case. It has not been contended that a licence is necessary to sell foreign game in England. Sect. 17 provides that persons having an annual game certificate shall have power to sell game to any person licensed to deal in it. Foreigners sending game from abroad have necessarily no such certificates, and therefore cannot have been contemplated by the legislature as being within the Act.

Cur. adv. vult.

1889. April 13. The judgment of Lord Coleridge, C.J., and Hawkins, J., was read by

HAWKINS, J. In this case the question to be decided is one of great importance to all dealers in game. It is whether during

(1) 8 B. & C. 553. (2) 8 B. & C. 553, at p. 556.
(3) 2 C. P. D. 553.

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the close season for English birds of game a licensed dealer in game in England is prohibited by law from having in his possession any foreign birds of game of the same denomination, even though they may have been lawfully killed abroad, out of the United Kingdom, and commercially consigned from abroad to this country as articles of food.

The case was argued in the first instance before the Lord Chief Justice and my brother Manisty, who differed in opinion, it was therefore thought right, inasmuch as there is no appeal from the decision of the Divisional Court, that it should be re-argued before three judges, and it accordingly was so re-argued in the early part of the present sittings before the Lord Chief Justice, my brother Manisty and myself. I regret to say there is still a division of opinion; the Lord Chief Justice and myself thinking that the law imposes no such prohibition. My brother Manisty taking the opposite view.

It is now my duty, in accordance with the usage of the Court, to deliver my judgment upon the matter. I had written it as expressive merely of my own independent opinion, without consulting the Lord Chief Justice upon it, because it seems to have been thought that his view of the matter was somewhat inconsistent with that expressed by him in a case of *Whitehead* v. *Smithers* (1) hereafter mentioned, and for that reason I have written more fully upon the subject than I might otherwise have done.

Since writing this judgment, however, I have shewn it to the Lord Chief Justice, and, as he approves of it, he has requested me to deliver it as our joint opinion upon the case.

The facts lie in a very narrow compass. In March, 1888, the appellant appeared before Mr. Partridge, one of the metropolitan police magistrates, to answer an information charging him, that he, being a person licensed to deal in game, did on March 1, 1888, unlawfully and knowingly have in his shop certain birds of game, to wit, two partridges after the expiration of ten days from the day on which it became unlawful to kill or take such birds, contrary to s. 4 of the Game Act, 1 & 2 Wm. 4, c. 32.

It was proved that the appellant on the day mentioned in the

(1) 2 C. P. D. 553.

information knowingly had in his shop the two birds hereafter referred to, exposed for sale, and that he was a person licensed to deal in game; that the said two birds were two out of a consignment of dead birds imported from Russia; that they had been killed in Russia in December, and were imported in a frozen condition; that they were of the same species as ordinary English partridges, and that the importation of such birds from Russia during certain times of the year had become a considerable trade. The learned magistrate held that the appellant had committed the offence charged, and find him 5*s*. for each bird.

This is an appeal against that decision. Whether the magistrate was right, or wrong, turns entirely upon the true construction of the 4th section of the statute above referred to, which is entitled "An Act to amend the Laws in England relating to Game," and was passed in the year 1831. By the 2nd section of that Act it is enacted that the word "game" shall, for all the purposes thereof, be deemed to include, among other birds, partridges. By the 3rd section it is enacted (inter alia) that if any person whatsoever shall kill or take any partridge between February 1 and September 1 in any year, every such person shall on conviction forfeit for every head of game so killed or taken a sum not exceeding 1*l*. with costs.

By the 4th section it is enacted that "if any person licensed to deal in game by virtue of this Act shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of ten days . . . from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; or if any person, not being licensed to deal in game by virtue of this Act, as hereinafter mentioned, shall buy or sell any bird of game after the expiration of ten days . . . from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid, or shall knowingly have in his house, possession, or control any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days . . . from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; every such person shall on conviction

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forfeit and pay for every head of game a sum not exceeding 1*l.* with costs.

The question which has arisen upon this section, and upon the solution of which our judgment depends, is this. Whether the section absolutely prohibits a licensed game dealer from buying or selling, or knowingly having in his possession within the prohibited period any partridge, English, or foreign, no matter where such partridge was killed or taken, either in or out of England; or whether the prohibition is limited to partridges killed or taken in England.

For the respondent it was contended that the prohibition is absolute, and in support of this contention it was urged that such was the plain language of the statute—that whilst the object of the legislature was, no doubt, merely to enforce a rigid observance of the close time for game birds in England—it was nevertheless thought expedient, with a view to secure that object, and to prevent the necessity of entering oftentimes upon a difficult inquiry as to where the game birds alleged to be illegally dealt with, were in fact killed or taken, to prohibit absolutely without exception, the buying, selling, or possessing within the prescribed period any of the game birds mentioned in the 4th section.

In support of this contention reference was made to, and great stress was laid upon various statutes for the protection of wild birds (39 & 40 Vict. c. 29), and for the preservation of salmon (36 & 37 Vict. c. 71), 1873, and fresh-water fish (41 & 42 Vict. c. 39), and to the cases hereinafter mentioned and discussed.

For reasons we will hereafter state, we look upon those statutes and authorities, when carefully considered, as affording but little assistance in elucidating the question before us. We think, therefore it will be more convenient that we should at once proceed to point out our view of the enactment, formed simply from a consideration of the objects and language of the statute itself. The title of the Act clearly indicates that its operation was intended to be strictly confined to England. The object of the section in question is unmistakeable; it was to provide a close time for the game birds mentioned therein, and to prevent their destruction during the season for breeding and raising their

young; and to carry out this object it prohibits the killing or taking during the prohibited periods any of such game birds. It is obvious that the restriction upon killing or taking game birds during the close season can only apply to the killing or taking such birds in England, there is nothing whatever in the Act to prevent anybody from killing or taking any game bird out of the realm, even though the bird so killed were identical with and bore the same name as an English game bird to which protection is afforded by s. 3.

We now turn to s. 4 to see what prohibition is imposed upon dealers in game. By that section they are prohibited from buying, selling, or having in their possession any bird of game after the expiration of ten days from the day on which it becomes unlawful to kill or take such birds of game; the word "such" having, in our opinion, reference only to the particular birds which are charged as having been unlawfully bought or sold by, or in the possession of the alleged offender. As regards a game bird killed or taken abroad, there is no day according to the law of England on which it could be unlawful to kill or take it in a foreign country; the very language of the statute fails to touch a game dealer who traffics only in birds lawfully killed or lawfully taken. As to the argument that, if the enactment in question did not operate absolutely to prohibit the sale of any of the birds of game specified, the object of the statute might oftentimes be defeated by reason of the difficulty which might arise in obtaining proof as to the locality where the bird was killed or taken, we may observe that that is a difficulty which if it existed would fall upon the dealer, against whom a good primâ facie case would always be made if it could be proved that he had bought, sold, or been in possession of a game bird undistinguishable from an English bird.

Moreover, it seems to us that it might well be contended that a partridge which never was alive in England, but was bred and killed in Russia, cannot be truly said ever to have been an English bird of game within the contemplation of an Act of Parliament which, so far as regards the killing or taking of game-birds out of season, could only refer to birds killed or taken on English ground, and as regards the traffic in game out of the

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prescribed season, must be intended to refer to such birds only as are protected by the close season. Foreign birds clearly are not protected by the English close season.

Why, then, should the possession of such birds, lawfully killed abroad, be forbidden by our law? Of course, if Parliament had expressly declared that no partridge, English or foreign, should be possessed by a person in England during a limited period of time, the law so made, reasonable or unreasonable, must be observed, but it certainly has not so declared.

Even if on the arrival of a dead Russian partridge in England it could be said to become English game, the title of "game" being after all the mere creation of an English statute, it is clear that none of the provisions for the preservation of game could reasonably be said to have been intended to apply to birds which were dead and incapable of preservation before they became English game at all; and though the words of the 4th section of the statute might by a strained construction be said to include them, such would not be a reasonable construction of it. In *Simpson* v. *Unwin* (1), which was an action for penalties under 2 Geo. 3, c. 19, and 39 Geo. 3, c. 34, forbidding the killing or possession of partridges between February 1 and September 1, it being proved that partridges which were killed before February 1, possibly on January 31, were in the defendant's possession after that day, the Court of Queen's Bench held that the statute did not apply, Lord Tenterden saying that the case was not within the object which the legislature had in view, although it might be within the literal meaning of the words taken by themselves; and Littledale, J., saying that the words of the Act might apply to persons having in their possession birds killed before the close time, but that the true meaning must be ascertained by looking at the object which the legislature had in view—namely, to prevent the killing and taking of birds within the period mentioned. Taunton and Patteson, JJ., were of the same opinion.

Further light is, we think, thrown upon the matter by a consideration of two or three other provisions in the same statute. By s. 17, any person who has obtained a game certificate (which by s. 6 of 23 & 24 Vict. c. 90 is to be read as licence to kill

(1) 3 B. & Ad. 134.

game) may sell game to any person licensed to deal in game. By s. 18, justices of the peace are empowered to grant licences to deal in game (23 & 24 Vict. c. 90, s. 14, requires an excise licence as well), such licences empowering the licensee to buy game at any place from any person who may lawfully sell game by virtue of that Act (i.e. from a person who has a game certificate), and also to sell game subject to certain conditions immaterial to the present question.

By s. 25 a penalty is imposed upon any person who sells game without a game certificate, or to any but a licensed dealer. Sect. 27 enacts that a person not licensed to deal in game may not buy from any person not licensed to deal in game under a penalty not exceeding 5*l.* for each head of game; and s. 28 subjects a licensed dealer in game buying or obtaining game of any person not authorized to sell game for want of a game certificate, or for want of a licence to deal in game, to a penalty of not exceeding 10*l.*

Now if a partridge reared and killed in Russia be a game bird within the meaning of the 1 & 2 Wm. 4, as contended for the respondent, it follows that under these sections a person duly licensed to deal in game might be convicted in a penalty of 10*l.* for buying at any period of the year, even out of the close period, from a Russian dealer, a Russian partridge in season, killed in that country, simply on the ground that he was not authorized to kill and take game in England for want of a game certificate. Whereas if he bought the same bird of a person who had a game certificate empowering him to kill game in England, where the bird never was a living bird, and where therefore it is clear it could not have been killed under such certificate, the purchase would have been perfectly lawful. This seems to us to reduce the matter almost to an absurdity. To us it is clear that s. 17 intended simply to authorize those who in England under the authority of game certificates killed or took game, to sell the game they so killed or took, and that birds coming from abroad, though designated as game in popular language, were not within the contemplation of the legislature at all. We come now to the consideration of the statutes and cases cited in the course of the argument. We begin with

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Helps v. *Glenister* (1), as being the earliest in date (1828). This was an action of trover for pheasants, brought by the plaintiff, a dealer in pheasants, who had purchased those in question from the defendant, who kept them for sale in pens at a place in Buckinghamshire—where they were bred. Where they were reared, and from whence they came there was no evidence. For the defendant it was contended that the purchase of game was made illegal by statute 58 Geo. 3, c. 75, and therefore the contract could not be enforced. On the other hand, for the plaintiff, it was urged that the selling was not unlawful, and therefore the buying could not be so, because there was in the statute 2 Jac. 1, c. 27, s. 4, an express exception, which was incorporated in the 58 Geo. 3, excepting from its operation pheasants reared in houses or brought from beyond seas. The Court, Lord Tenterden, C.J., delivering judgment, held that the express exception in the statute of James was not so incorporated, and, even if it was, there was no evidence to bring the case within it; inasmuch, therefore, as the pheasants in dispute were presumably English pheasants, the case was clear.

There was no discussion, however, whether reading the Act without any express exception it would have applied to pheasants brought from abroad.

The case is valueless therefore as an authority upon the point now under consideration. The wording of the statute there under consideration was moreover different from the Act of 1 & 2 Wm. 4, c. 32.

Neither do we think the statute 2 Jac. 1, c. 27, therein referred to assists in the interpretation of the section now under discussion, for although no doubt an express exception as to foreign birds was introduced, it has never been decided that it was necessary, and it may have been introduced only for greater caution. In *Rex* v. *Birmingham Canal Co.* (2), Abbott, C.J., said: "In every Act of Parliament . . . . there are many words introduced by the legislature pro majori cautelâ, and to prevent doubts."

The case of *Whitehead* v. *Smithers* (3) (1877), at first sight

(1) 8 B & C. 553. (2) 2 B. & A. 570, at p. 579.
(3) 2 C. P. D. 553.

does however appear to favour the respondent's views; carefully considered, however, we do not think it can reasonably be said to do so. That was a case in which the appellant charged the respondent, before an alderman of London, with unlawfully having in his control and possession a wild fowl, to wit, a plover, then recently killed, contrary to s. 2 of the Wild Birds' Protection Act, 1876 (39 & 40 Vict. c. 29), which enacts that "any person who shall kill, wound, &c. . . . . any wild fowl, &c., or shall have in his control or possession any wild fowl recently killed between the 15th of February and the 10th of July shall, on conviction, forfeit for every such wild fowl a sum not exceeding 1*l.* with costs." It was proved that the plover in question was a foreign bird, and was killed abroad, whereupon the alderman dismissed the case, the Court, however (Lord Coleridge, C.J., and Grove, J.), held, reversing that decision, that the respondent ought to have been convicted, according to the true construction of the enactment they were called on to interpret. Now, in the first place, the language of that enactment was very different from the one we have to construe. If that section had, after making it unlawful to kill any wild fowl within the prescribed period, gone on to enact that if any person should have in his control any "such" wild fowl recently killed, speaking for myself, I should, of course, have felt bound by the decision, though I should in my own mind have questioned the soundness of it. There is nothing, however, in the section then before the Court to indicate the intention of the legislature to limit the latter part of it to the possession of a wild fowl which had been recently unlawfully killed according to the earlier part of the same section. There is, however, another ground upon which the judgment in *Whitehead* v. *Smithers* (1) was based which abundantly establishes that our opinion in the present case is by no means in conflict with it. In the Wild Birds' Protection Act of 1872 (35 & 36 Vict. c. 78), s. 2, there was an exemption from the penalties imposed on persons exposing or offering for sale wild birds recently killed within the specified days, in favour of an accused person who should prove to the satisfaction of the justices that the said wild bird was bought or received of

(1) 2 C. P. D. 553.

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or from some person residing out of the United Kingdom. The 1st section of the 39 & 40 Vict. c. 29, recited that the protection accorded to wild birds by the preceding Act of 1872 was insufficient; and the 2nd section proceeded to remedy that defect by intentionally omitting the exemption in the Act of 1872. It was impossible to put a true construction upon the Act of 1876 without referring to the Act of 1872, and reading the two together, the intention of the legislature was obvious. Speaking again for myself only, I am far from saying that had there been no exemption clause in the first Act that Act would have applied to foreign birds killed abroad, but the exemption clause being in the first Act, and being deliberately omitted in the later statute, afforded striking proof of what the legislature intended when, without qualification in the later statute, it used in relation to the possession of wild birds the words "any wild fowl." In passing, we may observe that the exemption seems to have been very loosely drawn; according to its strict construction it would seem to absolve from penalty a person who had possession of even an English wild fowl killed in the United Kingdom if proof could be given that it was bought or received of or from some person residing out of the United Kingdom, but who might be making a temporary visit to this country. What, we would ask, under this exemption, could have been said to a consignment of wild fowl killed in the United Kingdom sent to a Dutch dealer resident abroad, and resold and delivered by him to a person who exposed them for sale in England?

By the Wild Birds' Preservation Act, 1880 (43 & 44 Vict. c. 35), s. 3, the legislature again substantially reinserted the exemption.

The case of *Taylor* v. *Rogers* (1) (1881, Lord Coleridge, C.J., and Manisty, J.) turned entirely upon the language of that reinserted exemption, and has no bearing whatever upon the present question. But it is worthy of note that in that same year, 1881, the 44 & 45 Vict. c. 51 was passed re-enacting the exemption clause for the purpose of removing doubts which had arisen as to the construction of former Acts; this is fair proof that the then legislature had no intention to put dead foreign birds upon the same footing as English ones.

(1) 50 L. J. (M.C.) 132.

The case of *Price* v. *Bradley* (1885) (1) was decided upon the Fresh-water Fisheries Act, 1878 (41 & 42 Vict. c. 39) s. 11, sub-s. 4 of which provides that if any person during the close season, buys, sells, or exposes for sale, or has in his possession for sale, any fresh-water fish he shall be liable to a fine not exceeding 40*s*. It was proved before the justices that the appellant had exposed eels for sale during the close season for England; it was further proved that the eels were caught in and exported from Ireland at a time when the catching and sale of them in Ireland was lawful. The magistrates nevertheless convicted the appellant, and the Court (Mathew and Wills, JJ.) upheld the conviction upon the ground that the sub-s. 4 of s. 11 imported an absolute prohibition of the sale or exposure for sale of fresh-water fish within the close time, wherever they may have been caught. It is not necessary for us to express our approval of or dissent from that judgment, because the enactments then before the Court were essentially different from that we have to interpret. If the 4th sub-section had stood alone, although no doubt the words are absolute, we should have hesitated to say that they were intended to apply to fish lawfully caught and lawfully sold in the place where they were caught, but in *Price* v. *Bradley* (1) as in *Whitehead* v. *Smithers* (2) the Court had not to consider that sub-section merely by itself, but in conjunction with and as a part of the Salmon Fisheries Act, 1873 (36 & 37 Vict. c. 71). In this latter Act there was an express exemption made in regard to the sale of salmon caught beyond the limits of the Act, whereas in the case of other fish no such exemption was made; this in itself was sufficient to justify the Court in holding that, as regards other fish, including eels, the legislature intended the prohibition to be absolute. *Price* v. *Bradley* (1) therefore is no authority against the view we take in the present case.

It is again worthy of note that in the year following this decision (1886) the 49 Vict. c. 2 was passed for the purpose of removing doubts which had arisen whether eels were fresh-water fish, and it removed such doubts by declaring they were not.

Assuming, as for the purposes of this case we do, these decisions to have been correct, and the statutes upon which they were made

(1) 16 Q. B. D. 148. (2) 2 C. P. D. 553.

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to have been rightly interpreted, there is something in these statutes, passed to remove doubts as to the true construction of the Acts to which they refer, which tends to shake our faith in the notion that the intentions of the legislature are always clearly and accurately expressed in the language it employs.

Lastly, it is to be observed that since the passing of the Game Act in 1832, a period of fifty-seven years, no case is reported of any conviction of an English game dealer for selling foreign game birds.

For the reasons we have given, we are of opinion that the conviction was wrong, and that the appellant is entitled to our judgment.

MANISTY, J. I regret that I have the misfortune to differ from the judgment just pronounced. I agree that the case is important to dealers in game, but the regulation of dealers is only a small part of the object of the Game Act. There is, no doubt, a provision as to dealers, but it renders "any person" —dealer or not—having partridges or pheasants in his possession after a certain number of days from the close time, liable to a penalty. I make that observation because it appears to me that my learned Brother has devoted much of his judgment to the question of dealers licensed to buy and sell game. I may have to notice that and other parts of the judgment presently, for I must confess that I am, at this moment, at a loss to understand whether the decision is that the Act is an English Act applicable to English birds only, or whether it is to apply to the United Kingdom.

The appeal was against a conviction by Mr. Partridge, one of the magistrates of the police courts of the metropolis, of John Guyer, a licensed game dealer, for that he on March 1, 1888, unlawfully and knowingly had in his shop two partridges contrary to the provisions of the statute 1 & 2 Wm. 4, c. 32 (1831), entitled "An Act to amend the Laws in England relative to Game." For the defence it was alleged that the Act applied to England only; that s. 3 related to killing game in England, and that s. 4 related to the possession of birds killed in England and did not include Russian game. The magistrate held that the

appellant had committed an offence against the Act, and that the Act drew no distinction between English and foreign game, and that the words of s. 4, "any bird of game" were general and included all birds of the species named in s. 2, and if s. 4 did not apply to game killed abroad great facilities would be open for evading the provisions of the Act. Such was the argument and the ground of the magistrate's decision. By s. 48 of the Act, it is enacted that "nothing in this Act contained shall extend to Scotland or Ireland," and that has to my mind a most important bearing on this case, because if Russian partridges may be imported, I cannot see why birds from Scotland and Ireland may not be imported also, and therefore I have some difficulty in appreciating the observations in the judgment delivered by my learned Brother on the point as to Russia—for that was not argued before the magistrate.

The contention before us on behalf of the appellant was the same as that before the learned stipendiary magistrate, namely, that the Act of 1831 is confined to England, and that s. 4 applies to birds of game (including partridges, pheasants, and grouse) killed in England, and to no other.

In order to ascertain the intention of the legislature, it is necessary first to consider the language of the Act itself, and if that language be clear, and free from ambiguity, it is the duty of the Court to give effect to it.

It seems to me that the language is so clear as not to admit of any doubt, but as my Lord the Chief Justice, and my brother Hawkins think otherwise, I propose to consider it minutely. Before doing so, however, it may be useful to consider the law relative to the protection of game, not only in England, but in Scotland and Ireland, prior to and at the time of the passing of the English Game Act (1831).

By s. 2 of 2 Jac. 1, c. 27 (1604), which applied to the whole of the then kingdom, it was enacted that any person who should shoot at or kill (among other birds) any pheasant or partridge, during the specified close time, should be liable to certain penalties. And by s. 4, it was enacted that every person who should during the close time sell or buy to sell again any partridge or pheasant (except partridges and pheasants reared and

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brought up in houses, or brought from beyond seas) should be liable to certain specified penalties.

This Act is recited in and repealed by the Act of 1831 as to England only.

I conclude that, but for the exception, partridges and pheasants brought from beyond seas would have been included in the general enactment.

By the 2 Geo. 3, c. 19, s. 1 (1761), entitled "An Act for the better preservation of Game in that part of Great Britain called England," it was enacted that no person shall upon any pretence whatsoever, take, kill, destroy, carry, sell, buy, or have in his possession or use, any partridge between February 12 (altered by 38 Geo. 3, c. 34, s. 3, to February 1) and September 1, or any pheasant between February 1 and October 1.

This Act which contains no exception of partridges or pheasants brought from beyond seas, was also repealed by the Act of 1831. I may here observe that the legislature seems to have thought that the statute of James II. had some operation in 1831, because it was repealed as an existing Act, and the exception of game birds brought from beyond seas was omitted from the Act of 1831; and I pray in aid of this argument the judgment just pronounced in which reference is made to the repeal of the Acts and the re-enactment of them with exceptions omitted. That is this case. Here a former Act was repealed and the exception in it omitted from the subsequent enactment.

By the 39 Geo. 3, c. 34, s. 3 (1799), it was enacted that no person shall on any pretence whatever have in his or her possession or use any partridge within the kingdom of Great Britain between February 1 and September 1 in any year. It is true that there was a limit to that provision and it must be taken to mean birds killed in close time, and not to prevent persons using, after the dates specified, birds killed previously.

This Act, which contains no exception, was also repealed by the Act of 1831.

Those are English Acts. Let me now turn to the Scotch and Irish Acts, because it has been said that each of those countries has its own law on this subject, and that the close times are different, and that is an answer to a very important part of the

judgment read by Hawkins, J., which it is said reduces the contention for the respondent to an absurdity.

By the Scotch Game Act, 13 Geo. 3, c. 54, s. 1 (1773), it was enacted that every person who shall have in his or her possession any muir fowl between December 10 and August 12, or any partridge between February 1 and September 1, or any pheasant between February 1 and October 1 shall be liable to certain penalties. Sect. 2 of the Act contains an exception of pheasants or partridges which shall be taken in the shooting season and kept in any mew or breeding place. There is a general enactment with an exception. This being the only exception, it seems to me to follow as a matter of course that the general enactment without the exception would have prohibited the possession during the close time of any partridge or pheasant, no matter when it was killed or where it came from.

The Irish Game Act of 1797 (37 Geo. 3 c. 21, Irish), imposed a penalty upon any person having in his possession any grouse or partridge during the specified close time. It contains no exception whatever.

I now proceed to consider the Act in question (1 & 2 Wm. 4, c. 32, 1831), which, as I have already said, is entitled "An Act to amend the Laws in England relative to Game," and by s. 48 it is enacted that nothing in the Act shall extend to Scotland or Ireland.

By s. 1 a great number of Acts are repealed, including 2 Jac. 1, c. 27, 2 Geo. 3, c. 19, and 39 Geo. 3, c. 34, so far as they related to England only.

By s. 2 it was enacted that the word "game" should include among others, pheasants, partridges, and grouse.

By s. 3 it was enacted that no person should kill any partridge between February 1 and September 1, or any pheasant between February 1 and October 1, or any grouse between December 10 and August 12.

That is as to killing, what that has to do with the subsequent section in question I am at a loss to conceive.

By s. 4 it was enacted that if any person licensed to deal in game by virtue of this Act as hereinafter mentioned, shall buy or sell, or knowingly have in his house, shop, stall, possession or

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control, any bird of game after the expiration of ten days . . . from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid, or if any person, not being licensed to deal in game . . . shall buy or sell any bird of game after the expiration of ten days . . . from the respective days . . . on which it shall become unlawful to kill or take such birds of game respectively as aforesaid, or shall knowingly have in his house, possession or control, any bird of game (except birds kept in a mew or breeding place) after the expiration of forty days . . . from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid," he shall be liable to a penalty.

It is important to note that the only exception is that of birds of game kept in a mew or breeding place, the exception of birds of game brought from beyond seas which was in the repealed Act of 2 Jac. 1, is, as I think, purposely omitted.

It can hardly be said that this omission was owing to inadvertence, seeing that the Act of Jac. 1 was recited in and repealed by this very Act of 1831.

If the case stopped here, I should say the intention of the legislature was clear beyond all doubt, namely, that the general enacting clause in s. 4 was subject to only one exception, namely, that of birds of game kept in a mew or breeding place.

It was contended by the counsel for the appellant that the Act of 1831 is confined to England, and that it has reference to birds of game killed in England only.

If that be so, it follows that not only partridges, pheasants, and grouse imported from beyond seas, but any of those birds brought into England from Scotland or Ireland may be bought and sold in England during the close time without the buyers or sellers being subject to any penalty, thus rendering the Acts for the protection of game not in England only, but also in Scotland and Ireland, practically a dead letter.

It is said that partridges or pheasants imported from beyond seas can be identified as not being English birds, and therefore there is no harm in allowing them to be bought and sold in England during the close time; that may be true of birds of

game imported from beyond seas, and it may furnish a reason for Parliament restoring the exception contained in the Act of James I., but it is no reason or justification for judges making a new law. Moreover, the reason is inapplicable to birds of game imported into England from Scotland or Ireland.

If I rightly understand the judgment of the Lord Chief Justice, and my brother Hawkins, which has just been read, they do not adopt the view of the law as contended for by the counsel for the appellant, namely, that only birds of game killed in England are within the 4th section of the Act of 1831, but in their opinion the section applies to birds of game killed in any part of the United Kingdom, and in support of that view they rely upon the 13th section of the 23 & 24 Vict. c. 90, which they say has extended the provisions of the Act of 1831 to the whole of the United Kingdom. If it had done so, still the question would have remained whether there was to be written into the 4th section of the Act, by implication, an exception of birds of game brought from beyond seas.

But, as it seems to me, my Lord the Chief Justice, and my brother Hawkins have entirely misconceived the purport and effect of the 23 & 24 Vict. c. 90. It is "An Act to repeal the duties on game certificates and certificates to deal in game, and to impose in lieu thereof duties on excise licences and certificates for the like purposes." It purports to deal, and does deal with game certificates and licences to deal in game, and offences against that Act, and has no bearing whatever upon the provisions now in question contained in the English Game Act of 1831, and has nothing at all to to with close times or having game during close times.

I now propose to consider several Acts in pari materiâ with the Game Act of 1831, and to see how they have been framed and how they have been construed.

First, I take the Act for the preservation of salmon in England and Wales passed in 1873 (36 & 37 Vict. c. 71). By s. 19 no person shall buy or sell, or expose for sale, or have in his possession for sale any salmon between September 3 and February 1. If the Act had stopped there, I take it to be clear that it would have prohibited the sale of any salmon wherever caught, but the

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general enactment is subject to an exception, namely, that nothing in the Act was to apply to (among other things) any clean fresh salmon caught beyond the limits of the Act, if caught under certain specified circumstances, and the burden of proving those circumstances was imposed upon the party having the salmon in his possession.

Next I take the Acts for the preservation of wild fowl. The 35 & 36 Vict. c. 78, passed in 1872, after reciting that it was expedient to provide for the protection of wild birds of the United Kingdom, it was by s. 2 enacted, among other things, that if any person should expose or offer for sale any wild bird mentioned in the schedule, recently killed, between March 15 and August 1, he should be liable to a penalty, unless he should prove that the bird was bought or received before March 15, or of or from some person residing out of the United Kingdom.

By 39 & 40 Vict. c. 29, after reciting that the protection afforded by the Act of 1872 was insufficient, it was by s. 2 enacted that any person having in his control or possession any wild fowl (specified in s. 1) recently killed or wounded, between February 15 and July 10, shall be subject to certain specified penalties. The exception contained in the Act of 1872 is omitted in this Act.

In 1877 the case of *Whitehead* v. *Smithers* (1) came to be decided, by the present Lord Chief Justice of England (then Lord Chief Justice of the Common Pleas), and Mr. Justice Grove. It was an information for exposing wild birds for sale contrary to the provisions of the Act of 1876, and the defence set up was that the birds were bought or received from a person residing out of the United Kingdom, and the respondent relied upon the exception in the Act of 1872, but the Court held that the defence failed on the ground that the Act of 1876 repealed the Act of 1872, and on the ground that there was no exception in the Act of 1876. My brother Hawkins admits that at first sight that decision seems opposed to the judgment which he has delivered. I think it is strongly against it. Except by saying that it differs in certain words or under certain circumstances it is impossible to distinguish it from the present case, and the reasons given in support of that decision are the very reasons on which

(1) 2 C. P. D. 553.

I found my judgment. The decision is that "It is no defence to an information under the Wild Birds' Protection Act, 1876, for exposing wild birds for sale during the prohibited season, that such birds have been bought or received of or from a person residing out of the United Kingdom." The Lord Chief Justice stated the legislation, that the first Act had an exception, the second had not, and held that the second Act, without the exception, had impliedly repealed the first Act with the exception, and said (1): "It is said that it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill foreign birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons." Substitute "game" for "wild fowl" and that passage will be exactly applicable to the present case. "The object is to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad." So here, the object is to prevent Irish or Scotch birds being killed and brought into England after close time under the pretence that they are foreign birds. Grove, J., gave his judgment to the same effect. I have listened with great attention to the attempt to distinguish that case from the present one, and I have failed to perceive any distinction. It is a decision directly in support of the conviction in the present case, and it was affirmed by another decision to the same effect and for the same reasons by the Lord Chief Justice of England and myself, in the case of *Taylor* v. *Rogers*. (2)

It seems to me to be impossible to hold that the conviction in the present case is wrong without overruling both these cases.

On September 7, 1886, another Act was passed for the protection of wild birds of the United Kingdom (43 & 44 Vict. c. 35), and by s. 3 penalties were imposed upon persons exposing or offering for sale, or having in their possession any wild bird after March 15, unless such person should prove that it was killed before the close time, or bought or received from some person residing out of the United Kingdom.

(1) 2 C. P. D. 553, at p. 556. (2) 50 L. J. (M.C.) 132.

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The legislature thus re-enacted and restored the exception which was contained in the Act of 1872.

It is difficult to conceive anything stronger than this to shew that the general words in the Game Act of 1831, subject to the one exception of birds of game kept in a mew or breeding-place, were intended to prohibit and did prohibit persons from having in their possession in England during the close time partridges or pheasants or any birds of game without regard to where they were killed, or where they came from.

The exception introduced into this Act (1880) was slightly altered by 44 & 45 Vict. c. 51, s. 1, passed in 1881. The alteration is immaterial to the present purpose.

I next come to the Fresh-water Fisheries Act, 1878 (41 & 42 Vict. c. 39), which is, if possible, still more conclusive, and applies like the Game Act of 1831 to England only—a most important fact. Sub-s. 4 of s. 11 provides that if any person during the close season buys, sells, or exposes for sale, or has in his possession for sale, any fresh-water fish he shall be liable to a penalty. There is no exception in the Act. In 1885 the case of *Price* v. *Bradley* (1) came before a Divisional Court of the Queen's Bench Division. It was an appeal against a conviction for exposing for sale in England in the close season eels exported from Toome Bridge, in Ireland, to Birmingham, the eels having been caught at a time when it was lawful to catch and sell them in Ireland. The Court, consisting of Mathew and Wills, JJ., held that eels were fresh-water fish, and that the Act applied to fresh-water fish, wherever caught, and affirmed the conviction. They came to the conclusion that there was a general enactment, and no exception. It is said that the Act is to be read with the Salmon Fishery Act, which excepted salmon caught beyond the seas at a time when they might be taken. That has nothing to do with Scotland and Ireland; they are left out of the case altogether. Yet Scotch and Irish partridges are far more the object of the Act than Russian partridges.

It seems to me that the judgment just pronounced overrules this decision in *Price* v. *Bradley* (1), and the decisions in the

(1) 16 Q. B. D. 148.

cases of *Whitehead* v. *Smithers* (1) and *Taylor* v. *Rogers.* (2) In other words the Lord Chief Justice overrules himself, and his Lordship and my brother Hawkins overrule four judges, namely, Grove, myself, Mathew, and Wills, JJ., and the stipendiary magistrate, Mr. Partridge.

To introduce into the Act of 1831 an additional exception of birds of game brought into England, whether from Russia, or Scotland, or Ireland, or elsewhere, would, in my opinion, be a violation of every canon of construction of the statute, and an unjustifiable overruling of the cases I have referred to, the more so because there is no appeal.

If the legislature should deem it right to introduce an additional exception into the Act, well and good; but that is the office of the legislature, not of any number of Her Majesty's Judges.

I am of opinion that the conviction was right and ought to be affirmed.

LORD COLERIDGE, C.J. I do not think it quite convenient to express our judgment on that of another judge, but I may say that if I had thought there was any fair analogy between an Act in 1831 repealing an Act of 1604 practically obsolete, and an Act which deals with an Act passed only three or four years before, and recites that doubts had arisen on the construction of that Act, I should have thought there was much to be said in favour of the judgment of my learned brother Manisty, but I fail to see the analogy, and therefore to feel the force of his reasoning.

Solicitor for appellant: *W. Doveton Smyth.*
Solicitors for respondent, prosecutors: *Powell & Goodale.*
Solicitor for magistrate: *The Solicitor of the Treasury.*

(1) 2 C. P. D. 553. (2) 50 L. J. (M.C.) 132.

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FARDEN AND ANOTHER *v.* RICHTER.

Practice—Setting aside Judgment—Service of Order, when Necessary—Affidavit Shewing Merits, Necessity for—Rules of Supreme Court, 1883, *Order* XXXI., *r.* 21, *Order* XLI., *r.* 5, *Order* XLVII., *r.* 2, *Order* LII., *rr.* 13, 14.

Interrogatories for the examination of the defendant were delivered by the plaintiffs on January 17. On February 5, the defendant not having filed answers, an order was made that if he should not file answers within three days judgment might be signed against him. On February 9, no affidavit having been filed by the defendant, the plaintiffs signed judgment under this order. On application by the defendant to set aside the judgment he stated on affidavit that on February 9 a copy of the order of February 5 had been left at his house and received by him, and that he in consequence filed on February 11, and as he supposed within the three days named in the order, answers to interrogatories which he had sworn on January 28. No affidavit shewing that he had a defence on the merits was filed by the defendant:—

Held, that the order did not require to be served, that the judgment was therefore regular, and that, in the absence of an affidavit shewing that he had a defence on the merits, the defendant was not entitled to have the judgment set aside.

The judgment of Field, J., in *Hopton* v. *Robertson* (W. N. 1884, p. 77) approved.

CROSS appeals from an order of Mathew, J., at chambers, varying an order of the Master by which the judgment signed against the defendant had been set aside.

The action was brought by the plaintiffs, the lessors, to recover from the defendant as assignee of the lessee possession of a dwelling-house together with arrears of rent and mesne profits. The defendant appeared in person. On February 5 an order was made that if he should not in three days file an affidavit in answer to the interrogatories delivered by the plaintiffs on January 17 the defence should be struck out and judgment should be signed against him. The judgment in question was signed on February 9 under this order. Before the Master a solicitor who appeared for the defendant read an affidavit by him stating that a copy of the order of February 5 had been left at the premises and received by him on February 9, and that he in consequence filed on February 11, and as he supposed within the three days, an affidavit in answer to the interrogatories which he had sworn on January 28. The order had not been drawn up

until February 9. The Master was of opinion that the three days were to be computed not from February 5, the date on which the order was made, but from February 9, the date of service. He therefore set aside the judgment with costs. Mathew, J., confirmed the order of the Master in so far as it set aside the judgment, but made the costs of the applications costs in the cause, and directed that no proceedings should be taken either against the plaintiffs or against the sheriff, who had taken possession of the house and furniture under writs of possession and fi. fa. on February 12, and who withdrew in consequence of the decision. The plaintiffs appealed against the order in so far as it set aside the judgment, the defendant against its other directions. No affidavit shewing that he had a defence on the merits had been filed by the defendant.

Crump, Q.C. (with him, *Ashton Cross*), for the plaintiffs. The appeal of the plaintiffs should be allowed, and that of the defendant dismissed. The latter ought to be regarded as having wilfully disobeyed the order of February 5 with knowledge obtained from his solicitor of the consequences: *Haigh* v. *Haigh*. (1) The order was properly made under Order XXXI., r. 21 (2), and by Order LII., r. 13 (2), took effect from the day on which it was

(1) 31 Ch. D. 478.

(2) By Rules of the Supreme Court, 1883, Order XXXI., r. 21: "If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a defendant, be liable to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a judge for an order to that effect, and an order may be made accordingly."

By Order XLI., r. 5: "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same, then shall be indorsed a memorandum in the words or to the effect following, viz.:—

"If you, the within-named A. B., neglect to obey this judgment (*or* order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (*or* order)."

By Order XLVII., r. 2: "Where by any judgment or order any person therein named is directed to deliver up possession of any lands to any other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit shewing due service of

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made. The considered judgment of Field, J., at chambers, in *Hopton* v. *Robertson* (1) is an express authority that such an order does not require to be served in order to found proceedings upon it. The judgment was therefore regular and could not be set aside except upon an affidavit disclosing merits. According to the judgment of the present Master of the Rolls in *Smith* v.

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such judgment or order, and that the same has not been obeyed."

By Order LII., r. 13: "Every order, if and when drawn up, shall be dated the day of the week, month, and year, on which the same was made, unless the Court or a judge shall otherwise direct, and shall take effect accordingly."

By Order LII., r. 14: "Where an order has been made not embodying any special terms, nor including any special directions, but simply enlarging time for taking any proceeding, or doing any act, or giving leave (*a*) for the issue of any writ other than a writ of attachment; (*b*) for the amendment of any writ or pleadings; (*c*) for the filing of any document, or (*d*) for any act to be done by any officer of the Court other than a solicitor, it shall not be necessary to draw up such order unless the Court or a judge shall otherwise direct; but the production of a note or memorandum of such order, signed by a judge, registrar, master, chief clerk, or district registrar, shall be sufficient authority for such enlargement of time, issue, amendment, filing, or other act. A direction that the costs of such order shall be costs in any cause or matter shall not be deemed a special direction within the meaning of this rule. The solicitor of the person on whose application such order is made, shall forthwith give notice in writing thereof to such person (if any) as would, if the rule had not been made, have been required to be served with such order."

(1) Weekly Notes, 1884, p. 77.

HOPTON *v.* ROBERTSON.

Order for Judgment under Order XIV.—Drawing up and Serving—Order LII., r. 14.

An order giving leave to sign judgment under Order XIV., unless a sum is paid before a day named, need not be served upon the defendant before judgment is signed upon it.

THIS was an appeal by the plaintiff from the order of a master setting aside judgment and execution in the action, and ordering the plaintiff to pay the costs of the application and the sheriff's charges.

Action for 22*l.* 11*s.*, the price of goods sold and delivered. On February 25 a summons under Order XIV. was heard before a master, when it was admitted by the defendant that the sum of 22*l.* 0*s.* 4*d.* was due. The master gave leave to sign judgment for that amount, with interest, if any, and 6*l.* 10*s.* for costs, unless 22*l.* 0*s.* 4*d.*, with 2*l.* 10*s.* for costs, was paid before Saturday, March 1. On March 1 the master's order was drawn up, and the money not having been paid, judgment was immediately signed, and execution issued. Later in the same day a tender of the amount was made by the defendant and was refused.

Corrie Grant, for the plaintiff. The judgment was regular, and, if it is set aside, it should be upon the terms of the defendant, not the plaintiff, paying the costs.

Dobbins (1), this is an established rule of procedure. There is a statement to the same effect in Chitty's Practice, 14th ed. p. 266.

Crispe, for the defendant. The appeal of the plaintiffs should be dismissed and that of the defendant allowed. The judgment was properly set aside. The order took effect from February 9,

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H. D. Greene, for the defendant. The judgment was irregular, because the order of February 25 was not served upon the defendant. By the practice both at common law and in equity an order must be served before it can be enforced. By Order LII., r. 14, certain specified orders need not be drawn up, but, except in that respect, there is nothing in the rules to alter the former practice.

[He cited Lush's Practice, 3rd ed., p. 953; Chitty's Practice, 13th ed., p. 1281; Daniell's Chancery Practice, 11th ed., p. 1545; *Metcalfe* v. *British Tea Association* (46 L. T. (N.S.) p. 31.)

FIELD, J. I have looked through the cases with which Mr. Greene has furnished me, but I do not find that they establish the proposition that an order must in all cases be served before it can be enforced. One of them, *Land Credit Co. of Ireland* v. *Fermoy* (L. R. 5 Ch. 323), was an authority to the contrary. The master could only have given the defendant the costs in this case upon the ground that the plaintiff was wrong in signing judgment when he did. Possibly in a case of very sharp practice the master might make the plaintiff pay the costs where he was technically right; but there was no such sharp practice here. The order unquestionably was that the money should be paid before Saturday, and, that not having been done, judgment was signed on that day. The proposition in the text-books as to the necessity in certain cases of drawing up and serving the order does not apply when the party to be served has himself to take the next step under the order. It is when the other side may suppose that the order is abandoned that the necessity of service arises. Where for instance an order is made giving a party time to plead, it must be drawn up and served on the other side. If an order is obtained upon terms which limit the exercise of the applicant's free action, it need not be drawn up, and he can then take the step which he would otherwise be entitled to do; and it is therefore necessary in such a case that the other side should know whether the order is to be acted on or not. But in the present case an order for judgment was made unless a certain amount was paid by the defendant before a day named. I think it was not necessary to serve this order, before signing judgment upon it, in default of the sum named being paid. The judgment was therefore regular, and the defendant should pay the costs of it; but the costs of service should be deducted from the fixed sum allowed for costs in these cases.

Order varied by directing defendant to pay costs of judgment less costs of service of the order; defendant to pay costs of the application.

Solicitors for plaintiff: *George Davis, Son & Co.*

Solicitor for defendant: *E. Sweeting.*

(1) 37 L. T. (N.S.) 777.

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the date at which it was served on the defendant, and the affidavit was therefore filed in time: *Hopton* v. *Robertson* (1) is not in accordance with the previous practice, and does not relate to an order made under Order XXXI., r. 21. Service of the order was also necessary under Order XLVII. r. 2, in order to justify the issue of a writ of possession. There is nothing to shew that the defendant knew of the order before February 9, and, if service could be dispensed with, he was entitled to notice under Order LII., r. 14.

Crump, Q.C., in reply. Order XLI., r. 5, does not apply, as the orders under which the judgment was signed did not contemplate the attachment of the defendant for contempt.

HUDDLESTON, B. I am reluctant to interfere in a case in which both a master and a judge have exercised their discretion in favour of the defendant, but I think that the Court has no option but to allow the appeal of the plaintiffs against that part of the learned judge's order which sets aside the judgment.

The action is one of ejectment. The defendant delivered a defence. The plaintiffs exhibited interrogatories. The defendant delayed to answer, and, in this state of things, on February 5 an order was made to the effect that if he should not file an affidavit in three days his defence should be struck out and judgment should be signed against him. The judgment which has been set aside was signed by the plaintiffs under this order on February 9, at which date no affidavit had been filed by the defendant.

In what respect was this judgment irregular? The learned counsel for the defendant contends that it was so, because the order of February 5 had not been served upon the defendant. The order was, however, made in the presence of a solicitor employed by the defendant, and it is not therefore unfair to suppose that he became aware of its terms. But *Hopton* v. *Robertson* (1) is a reported case, in which Field, J., sitting at chambers, expressly held that such orders did not require to be served. The decision is one of a series of decisions which were given by that learned judge when he sat at chambers at the

(1) See ante, p. 126.

instance of the Lord Chancellor in order to superintend the formation of the practice under the new rules, and it is evidently the result of careful consideration. We have examined the circumstances of the case and the arguments which were addressed to our learned brother, and we agree with the decision. Clearly also the order is not affected by Order XLI., r. 5, which only refers to cases in which it is intended to threaten attachment. The order, therefore, did not require to be served, and the judgment which has been set aside was therefore a regular judgment properly signed.

The application to set it aside must be taken to have been met on the threshold by the objection that the defendant had not made any affidavit suggesting that he had a defence on the merits. During the argument I was inclined to doubt whether such an affidavit could be always necessary. But in *Smith* v. *Dobbins* (1) the present Master of the Rolls appears to have stated that it was "an inflexible rule" that a regular judgment properly signed could not be set aside without such an affidavit, and there are statements in the manuals of practice to much the same effect. The expression is perhaps strong, but, where there is no such affidavit, it is only natural that the Court should suspect that the object of the applicant is to set up some mere technical case. At any rate, when such an application is not thus supported, it ought not to be granted except for some very sufficient reason.

The result is that the appeal of the plaintiffs will be allowed with costs here and below, while the appeal of the defendant will be dismissed with costs. I think, however, that the issue of a writ of possession should be delayed for a week in order to give the defendant time to withdraw, but that for the plaintiff's protection he ought to be at liberty to proceed at once under a fi. fa. I also think that the sheriff should be allowed the charges of the execution.

MANISTY, J. I am of the same opinion. It seems to me that the defendant may possibly have been misled by what passed with respect to the order of February 5, but that in the absence

(1) 37 L. T. (N.S.) 777.

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of an affidavit shewing that he has a good defence on the merits, the judgment against him ought not to be set aside. This is, I think, the effect of the decision of the Court of Appeal in *Watt* v. *Barnett*. (1) I may add that the answers of the defendant to interrogatories do not satisfy me that he has a good defence on the merits. I agree with my learned brother as to the terms of our order.

Order accordingly.

Solicitors for plaintiffs: *Turner & Low.*
Solicitor for defendant: *G. S. Tinkler.*

H. D. W.

April 15.

EDER & CO. AND FIELD *v.* ATTENBOROUGH & GEORGE, BARNETT, VAUGHAN, & SMITH AND DIMOND.

Practice—Discovery—Interrogatories—Several Defendants—Deposit of 5l.—Order XXXI., r. 26.

By Order XXXI., r. 26, "any party seeking discovery by interrogatories shall before delivery of interrogatories pay into court . . . the sum of 5*l.*"

The plaintiff in an action against several defendants delivered separate copies of the same set of interrogatories to the defendants respectively, each defendant being required to answer particular interrogatories only:—

Held, that, in the circumstances, the plaintiff need not pay into court more than one sum of 5*l.*

By the latter part of rule 26 the party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment of 5*l.* has been made:—

Held, that this provision does not, in the event of non-payment of the 5*l.*, entitle the party from whom discovery is sought to apply for an order to strike out the interrogatories.

APPEAL from Chambers.

The action was brought by the plaintiffs for detinue and the conversion of jewellery which had been fraudulently obtained from them by one Isemberg, and disposed of by him to several pawnbrokers, the defendants. The defendants delivered a joint defence.

The plaintiffs administered interrogatories for the examination of all the defendants, and at the end thereof required the defendant Barnett to answer all these interrogatories except No. 3,

(1) 3 Q. B. D. 363.

the defendants Smith and Dimond to answer all except Nos. 1 and 2, and the other defendants to answer all except 1, 2, and 3. On filing the interrogatories the plaintiffs paid one sum of 5*l.* into court. The defendants applied to a master at Chambers for an order to strike out the interrogatories on the affidavit of their solicitor stating that the plaintiffs were persons unconnected with each other carrying on entirely separate and independent businesses, that the action was brought to recover certain goods claimed by the plaintiffs Eder & Co., and certain other goods claimed by the plaintiff Julius Field, and that the plaintiffs did not allege that any of the goods were the joint property of the plaintiffs or in the joint possession of the defendants or any two or more of them, and that the claims were distinct, that it was impossible for the defendants to answer the interrogatories otherwise than by five separate and independent affidavits, the cost of which would amount to far more than the amount paid into court by the plaintiffs, that it was important to the defendants that proper security should be given for the costs of the discovery. The master ordered that the interrogatories be struck out unless within seven days the plaintiffs paid into court as security for costs the further sum of 42*l.* 10*s.*

On appeal to Mathew, J., the order was reversed. The defendants appealed.

Moses, for the defendants. By Order XXXI., r. 26, any party seeking discovery by interrogatories shall before delivery of interrogatories pay into court to a separate account in the action . . . the sum of 5*l.* . . . The plaintiff sues separate and distinct defendants and seeks to deliver a set of interrogatories to each of them. A separate sum of 5*l.* should have been paid in respect of each set: *Smith* v. *Reed and Others* (1) per Field, J., at Chambers. In *Campbell and Others* v. *Lord Poulett and Others* (2) the same learned judge held at Chambers in a case where discovery was sought from the plaintiffs that deposit of a single sum of 5*l.* was sufficient, but that was because there was only one application against all. In *The Whickham* (3) one sum was held

(1) W. N. Dec. 1, 1883, p. 196. (2) W. N. Feb. 23, 1884, p. 48.
(3) 53 L. T. 236.

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sufficient in respect of a number of defendants, but they were co-owners of a ship. Here the defendants are unconnected in any way and have no interest in common. They will incur costs to the extent of more than 5*l.* each in answering the interrogatories.

Rose-Innes, for the plaintiffs. The same interrogatories are delivered to each, and some questions are applicable to them all, although some defendants are required to answer certain questions only. Order XXXI., r. 26, requires only one sum of 5*l.* to be deposited. *Campbell and Others* v. *Lord Poulett and Others* (1) applies. In *The Whickham* (2), Butt, J., intimated that he had no power to order payment of more than 5*l.* The intention of requiring such payment was to ensure bona fides in the person seeking discovery, and to prevent the frivolous and vexatious use of interrogatories. 5*l.* was fixed as an arbitrary sum, with an additional 10*s.* in respect of extra folios, so as to prevent undue length. At least it is a matter of discretion whether more than 5*l.* should be ordered.

[FIELD, J. Rule 26 seems to relieve the defendants from answering if the right sum is not paid.]

Moses, in reply. The remedy is by an order to strike out the interrogatories as in *Smith* v. *Reed*. (3)

POLLOCK, B. This case raises the important question whether a person seeking discovery by means of several sets of interrogatories in an action against several defendants must pay into court one sum of 5*l.*, or a sum of 5*l.* in respect of each defendant to whom the interrogatories are administered. Let me say at the outset that I am satisfied that this order to "strike out" the interrogatories is wrong in form, for the reason given by my brother Field, that Order XXXI., r. 26, expressly states what shall be the effect of non-payment into court, viz.: "The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made." But I should be sorry to dispose of the case on that ground, inasmuch as many judges have made similar orders in the same form. These interrogatories are, in themselves, proper,

(1) W. N. Feb. 23, 1884, p. 48. (2) 53 L. T. 236.
(3) W. N. Dec. 1, 1883, p. 196.

and do not violate the rules; the defect, if any, is said to be that the right sum of money has not been paid into court. Apart from its form, I think that the order of my brother Mathew was correct. This is not a case of different defendants defending by separate solicitors, and each having independent rights. The right of action was common, and to a great extent common against all; and in the course of the proceedings it was necessary for the plaintiffs to ascertain from the defendants facts which they could not otherwise find out. Therefore these interrogatories were filed, and, unless there are some circumstances not shewn in the present case, justice is satisfied by payment of one single sum of 5*l.* on filing the interrogatories. But we come to a question of more importance than the other two. It seems to have been considered by the learned judges before whom the question has come that it was a matter of discretion. I not only doubt that, but my present impression is that it is not. The rule begins by declaring that "any party seeking discovery by interrogatories shall before delivery of interrogatories pay"—not to the opposite party, but—"into court . . . . the sum of 5*l.*;" then it proceeds on the assumption that in some cases 5*l.* will not be sufficient: "And if the number of folios exceeds five, the further sum of 10*s.* for every additional folio." I cite that only because it shews that the intention of those who drew the rule was called to the necessity in some cases for paying more than 5*l.*, and it would have been just as easy to say that a sum of 5*l.* should be paid in respect of each separate defendant as to say that an extra sum should be paid if the interrogatories exceed a certain length. The rule ends with a provision that "the party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made," which seems clearly to refer to the particular payment prescribed. I think that the rule is intended to prevent persons being harassed or troubled by interrogatories until the sum is paid into court, and that we ought not to infer from it that, instead of one sum, there should be more than one sum, or even many sums paid in respect of several defendants. I do not think it is a matter of discretion, but it is sufficient to say that this appeal should be dismissed with costs.

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FIELD, J. I am also of opinion that the order of my brother Mathew was well made. In the present case there was no application to strike out the names of any of the defendants as having been improperly joined. It was alleged in the affidavit of the defendants' solicitor that the plaintiffs have no joint interest, and the defendants have not been guilty of any joint tort; if that is so and the transactions are so separate that a learned judge might think they ought not to be tried together, that would be the subject of a distinct application. The plaintiffs have administered to the defendants one set of interrogatories. It is true that although the plaintiffs profess to have only one set of interrogatories, they ask defendant A. to answer some, and B. some, and C. others. But that is constantly done. A landlord and his bailiff may be sued for cutting down trees, and the plaintiff may ask the landlord whether he is entitled to the land in fee simple, and the bailiff whether he did the particular acts alleged as a trespass. The plaintiffs, under these circumstances, therefore have delivered one set of interrogatories. The defendants rely on my decision on the case in which I held that payment of 5*l.* was not enough. But in that case the party had delivered separate and distinct sets of interrogatories, one set to A., and one to B., and so on, and I thought, and still think, that I was right in holding that a deposit in respect of each set was necessary. It is true that I made an order in the form in which the learned counsel has made this application, viz., to strike out the interrogatories, but my attention was not drawn to the words at the end of rule 26. The contention for the defendants is that the plaintiffs are a "party," and have delivered interrogatories under rule 26, and have only paid 5*l.* to the security for costs account, and ought to pay more, viz., a sum of 5*l.* in respect of each defendant. The rule was framed by the eminent judges who had made the previous rules, which gave the right of joining plaintiffs in as many interests as you please, and as many defendants in respect of as many rights as you had against them, and I agree with my brother Pollock that we might have expected apt language to have been used if the intention of the rule was that suggested. But I find nothing of the kind. It speaks of any "party," and "delivery of interrogatories." What

right have we to do more than the rule itself prescribes? The rule has said that the party delivering interrogatories is to pay into court the sum of 5*l.* That 5*l.* is not directed to the costs of the party in answering. There is nothing in the rule as to that, but the contrary, for when it speaks of more than 5*l.* it has reference, not to the costs of the party answering, but to the length of the interrogatories. It seems to me that cost does not fall within the language of r. 26. If, indeed, there were any ground for saying that there was an equity in the defendants to have more than 5*l.* paid into court because they were interested in getting the 5*l.*, an argument might be founded on that. But such is not the result of the order. Rule 27 shews that the money does not go into the pockets of the defendants, but is paid into a particular fund, "the security for costs account," and it is only in the event of the Court or judge ordering payment of costs to the party, that an equity attaches to the 5*l.* paid into court. I think, therefore, that the principle on which I decided *Campbell* v. *Lord Poulett* (1) applies. I look upon this rule as a restriction on what would otherwise be a right in the party seeking discovery, but as not intended to deprive him of the power of reasonably interrogating by requiring him to pay a large sum. The rule makes the deposit of 5*l.* a condition. Why? That a litigant may not be vexed with interrogatories unless the person seeking to administer them satisfies the Court of his bona fides by finding a sum of 5*l.*, except in a particular case, when more must be paid.

In *Campbell* v. *Lord Poulett* (1), the objection was taken at the right stage, but I do not decide this case on the ground that the objection is not taken at the right time.

Appeal dismissed.

Solicitors for the plaintiffs: *Lewis & Churchman.*
Solicitors for the defendants: *J. & C. Attenborough.*

(1) W. N. Feb. 23, 1884, p. 48.

J. R.

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April 30.

GLEDHILL *v.* CROWTHER.

County Council—Election—Nomination Paper—Signature—Addition of Word "Junior"—Name in Register without Addition—Validity of Nomination—Local Government Act, 1888 (51 *&* 52 *Vict. c.* 41).

The nomination paper for the election of a county councillor was signed by a nominator "James Sykes, junr." The name James Sykes appeared in the register of county electors without the addition of the word "junior." The number set against the name in the nomination paper and in the register was the same. The usual signature of the nominator was "James Sykes, junr." and he was generally known as James Sykes, junr., although his father was dead:—

Held, that the nomination paper, being signed with the ordinary signature of the nominator, was valid.

CASE stated, in an election petition, under the Local Government Act, 1888 (51 & 52 Vict. c. 41), and Acts incorporated therewith.

The petitioner and respondent were candidates at the election of a county councillor.

The petitioner was nominated by a nomination paper signed by his proposer "James Sykes, junr.," whose number on the county register was given correctly, 1 A 609.

It was objected that the name James Sykes, junr., the nominator, did not appear upon the register. The deputy returning officer allowed the objection. The respondent was elected and returned. It was found in the case that the name of James Sykes appeared upon the register though without the addition of the word "junr.," and that the number on the nomination paper and register was the same; that there were three persons (other than the proposer) of the name of James Sykes entered on the register with different numbers, that the addition of "junr." was first used as part of his signature to distinguish him from his father, who had been dead for many years, and he was generally known throughout the division as "James Sykes, junr." His usual signature was and always had been "James Sykes, junr." None of the other three persons of the same name was known or signed as James Sykes, junr.

The question for the opinion of the Court was whether the

objection to the nomination of the petitioner ought to have been allowed.

J. V. Austin, for the petitioner. Even if the nomination had been for a municipal election in which the form prescribed in Sched. 8 of the Municipal Corporations Act, 1882, would be used, this nomination with the usual signature of James Sykes would be valid. But it is unnecessary to argue that the form in Sched. 8 is satisfied, for the schedule is not incorporated with the Local Government Act, 1888 (51 & 52 Vict. c. 41). [He was stopped.]

Cyril Dodd, for the respondent. The returning officer looks at the burgess roll and nomination paper. He cannot undertake any further investigation. On comparing them in the present case they were found not to correspond. "James Sykes" was on the roll, whereas the nomination purported to be by "James Sykes, junr." In *Moorhouse* v. *Linney* (1) "Charles Arthur Burman" signed the nomination paper, but his name was erroneously entered on the roll as "Charles Burman," and the Court upheld an objection to the nomination on that ground, although there was no doubt as to the identity. So in *Gothard* v. *Clarke* (2), where there was only a difference in the number on the roll and in the nomination paper. The ordinary signature of the nominator who uses only the initials of his Christian name will suffice: *Bowden* v. *Besley*. (3) But there the initials were correct, and here a misleading addition is made to the name. The nominator was no longer James Sykes, "junr."

The forms in Sched. 8 may not be specifically incorporated in the Local Government Act, 1888, but it is submitted that there is a general incorporation of them.

MATHEW, J. This case appears to be very clear on the argument, and still more clear from the decision in *Bowden* v. *Besley*. (3) The form of the nomination paper requires the person's signature to it. That must mean his ordinary signature. The form further requires that the number of that person on the register should also be stated. It is found as a fact that the

(1) 15 Q. B. D. 273. (2) 5 C. P. D. 253.
(3) 21 Q. B. D. 309.

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person signed the nomination paper with his usual signature. "His usual signature was and always had been James Sykes, junr." In the county register the name was "James Sykes"—a misdescription, in one sense, of the person entitled to vote because he was ordinarily known as "James Sykes, junr.," but he was not responsible for the mode in which his name appeared on the register. His ordinary signature was not on the register, and the returning officer allowed an objection taken on that ground. I think that he was wrong. "Junr." is no part of the nominator's name, but was an addition which he was in the habit of making to his signature. The case comes directly within *Bowden* v. *Besley* (1), and I am not pressed with the earlier authority which is supposed to be somewhat in conflict with that one, for in the earlier case there was an evident discrepancy between the two names, the signature was different from the name on the register, and the Court held that the nomination paper was bad. That case is not like this. There is here no real difference between the name on the register and the signature. This is in principle the same as the case of description by initials, which has been held sufficient. The nominator's ordinary signature is in compliance with the Act, and it is no objection that it does not appear in the same exact form on the register.

GRANTHAM, J., concurred.

Judgment for petitioner.

Solicitors for petitioner: *Burn & Burridge.*
Solicitors for respondent: *Mills & Bibby.*

(1) 21 Q. B. D. 309.

J. R.

MARTON *v.* GORRILL.

1889
May 2.

County Council—Election—Nomination Paper—Omission of Name of Electoral Division—51 & 52 *Vict.* c. 41 (*Local Government Act*, 1888), *s.* 75—45 & 46 *Vict.* c. 50 (*Municipal Corporations Act*, 1882), *s.* 72.

The deputy returning officer for an electoral division of a county supplied for use at an election of a county councillor printed nomination forms in which the name of the division did not appear, but space was left for it. A candidate was nominated by one of such forms, which was signed by the nominators and delivered to the officer without the name of the division having been inserted:—

Held, that the omission was a "mistake in the use of the form" within s. 72 of the Municipal Corporations Act, 1882, as incorporated with the Local Government Act, 1888, and did not affect the validity of the nomination.

CASE stated, in an election petition, under 51 & 52 Vict. c. 41, the Local Government Act, 1888. The following is a summary of the material facts:

The petitioner and respondent were candidates at an election of a county councillor for the Lonsdale South Electoral Division of the county of Lancaster. The petitioner was duly qualified to be elected for that or any other division of the county. The deputy returning officer, who acted for the division of Lonsdale South and for no other electoral division, gave notice of the election for that division and supplied to the petitioner nomination papers in which a space for the name of the division was left blank. At the bottom of the paper were "instructions" as to signatures, and the delivery of the nomination paper. The nomination paper nominating the petitioner and duly signed was delivered to the said deputy returning officer. The name of the electoral division was not inserted. The heading was as follows:

"Lancashire.
"Local Government Act, 1888.
"Election of County Councillor for the Electoral Division of ——.

"We, the undersigned, being respectively county electors of the above division, do hereby nominate the following person as a candidate at the said election . . ," &c.

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Objection to the nomination was made on the ground that the division was not specified.

The deputy returning officer allowed the objection and decided that the nomination was invalid, and returned the respondent as elected.

The question was whether the decision was right.

J. V. Austin, for the petitioner. The form of nomination paper in Sched. 8 of the Municipal Corporations Act, 1882, is not incorporated in the Local Government Act, 1888 (51 & 52 Vict. c. 41). By s. 75, Part 1 of Sched. 8 of the Act of 1882 is applied with the necessary modifications. But Part 1 contains only forms of declaration on accepting office. Part 2 of Sched. 8—which contains a form of nomination paper—is not incorporated. By s. 75, Part 13 of the Act of 1882 is indeed incorporated, and Part 13 includes s. 240, which provides that "the forms in the eighth schedule, or forms to the like effect, varied as circumstances require, may be used, and shall be sufficient in law." But that must be so far as Sched. 8 is incorporated and no further. The legislature by expressly including Part 1 impliedly exclude Part 2 of Sched. 8, and it follows that in elections for the county council no particular form of nomination is required. All that is required is that duly qualified nominators shall sign the nomination paper. The deputy returning officer acted only for the division of Lonsdale South. He issued the nomination paper; it was returned to him duly signed, and could not apply to any other division than that for which he acted. Moreover, it was his duty to ascertain that the nominators were on the burgess roll, and when he referred to their names on the roll he would see the division. The test is whether the inaccuracy was calculated to mislead: *Moorhouse* v. *Linney*. (1)

[MATHEW, J. Sect. 72 of the Municipal Corporations Act, 1882, seems applicable.]

R. S. Wright, for the respondent. There is a similar section in the Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 13; but in *Gothard* v. *Clarke* (2) Lopes, J., said that it was never intended to apply to any questions arising before the returning officer,

(1) 15 Q. B. D. 273. (2) 5 C. P. D. 253.

but referred to a time subsequent to a return, when the election was completed. That judicial interpretation having been put on s. 13, the terms of it were adopted in the Municipal Corporations Act, 1882, s. 72. Sects. 240 and 241 do not apply. There is no "misnomer or inaccurate description," but an omission: *Reg.* v. *Tugwell.* (1) The omission is material. In the absence of any indication on the nomination paper, the deputy returning officer has no means of knowing the division for which the candidate is nominated. It is found as a fact that the petitioner was qualified for election in all the divisions of the county. A candidate qualified in two divisions might obtain a nomination signed in blank but intended for a particular division, and he might use it for another. The nomination paper must be complete. See *Harmon* v. *Park.* (2)

MATHEW, J. (after referring to the special case and the form of the nomination paper) said: That form was supplied to the electors of the division and, no doubt, one of those forms came into the hands of the nominators. After the nomination paper had been delivered to the returning officer on this paper supplied by him, the objection was taken that the name of the division had been omitted. I am satisfied that the election had been conducted up to that point according to the principles of the Act of 1882, with which the Act of 1888 is incorporated. The nomination was of a person qualified to be elected, and the nominators were qualified to vote. After that, the objection was made to the same returning officer that the form used was an improper form by reason of the omission of the name of the division. The question is whether there is anything in the Act to meet the objection? Sect. 72 applies. It provides that "an election shall not be invalidated by . . . mistake in the use of the forms in the eighth schedule, if it appears to the Court . . . that the election was conducted in accordance with the principles laid down in the body of this Act."

It was argued that we ought to construe "election" as "complete election." I think that the use of an inaccurate form in the course of the election is provided for by the section. If not,

(1) Law Rep. 3 Q. B. 704. (2) 7 Q. B. D. 369.

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the consequence would be that when there had been a mistake of the returning officer before the actual election there would be no means of setting it right. The authorities referred to do not support the contention. The case so invariably cited, *Gothard* v. *Clarke* (1), stands alone. It was under the Ballot Act, 1872, which contains a provision that has been omitted from the statute now in question, and the phraseology of the section is not the same. This was clearly an inaccuracy in the form, and therefore the returning officer was wrong, and the petition must be allowed.

GRANTHAM, J. I am of the same opinion. I think that it is necessary to go back to an earlier stage than that already referred to in order to see whether the objection ought to be held valid. Notice of an election for the Lonsdale South Division was given. At the bottom of the nomination paper was this instruction: "The nomination paper must be delivered by the candidate or his proposer or seconder at the place, and before the time stated in the notice of the election."

The election was not for all Lancashire, but only for Lonsdale South Electoral Division. Consequently the nomination paper required, pursuant to the notice of election, which is limited to Lonsdale South, could only be a nomination paper for this particular election. I do not think therefore that it is of any great importance that in the paper delivered by the returning officer for the nomination paper the name of Lonsdale South was not inserted. The nomination paper refers to the notice of election, and that says "Lonsdale South," which is the electoral division.

It would indeed be a miscarriage of justice if we were unable to remedy this omission. I think it comes within the provisions of s. 72, and that the decision of the deputy returning officer was wrong.

Petition allowed, with costs.

Solicitors for petitioner: *Crowders & Vizard.*

Solicitor for respondent: *T. R. Hargreaves.*

(1) 5 C. P. D. 253.

J. R.

STEVENS, APPELLANT *v.* GREEN AND OTHERS, JUSTICES, RESPONDENTS.

1889
May 3, 6.

Licensing Acts—Licence—Disqualification of Licensed Person—Application by Owner of Premises for New Licence—9 Geo. 4, *c.* 61, *s.* 14—37 *&* 38 *Vict. c.* 49, *s.* 15.

Where a licensed person has become personally disqualified or has had his licence forfeited the owner of the premises cannot apply under 9 Geo. 4, c. 61, s. 14, for a renewal of the licence, but must apply under 37 & 38 Vict. c. 49, s. 15, for the grant of a new licence, and such application must be made to the next special sessions.

Reg. v. *Justices of Liverpool* (11 Q. B. D. 638) distinguished.

AT the general licensing sessions for the year 1887, holden at Sharnbrook, in the county of Bedford, an alehouse licence under 9 Geo. 4, c. 61, was granted to one Nutter in respect of certain premises known as the "Boot Inn" at Riseley.

In January, 1888, Nutter was convicted of felony.

On February 10, 1888, William Henry Murfin, the landlord of the premises, having obtained possession thereof, made an application under 5 & 6 Vict. c. 44, and 37 & 38 Vict. c. 49, s. 15, at the Sharnbrook petty sessions for authority to carry on the business of the inn until the then next special licensing sessions.

The next licensing sessions were on March 6, 1888, but the authority was granted until the licensing sessions holden April 6, 1888.

On April 6, 1888, the appellant, having become the tenant and occupier of the inn, applied for a transfer of the licence granted in respect thereof to himself, but such application was not granted, and the appellant never was the holder of any licence in respect of the inn.

On September 7, 1888, the appellant, being still the tenant and occupier of the inn, applied to the respondents at the general annual licensing sessions for a renewal of the licence granted for the previous year to Nutter in respect of the inn, but the respondents rejected the application.

The appellant duly appealed at the Michaelmas quarter sessions for the county of Bedford against the decision last mentioned.

On behalf of the appellant it was contended that he was a

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person entitled to apply for a renewal of the licence granted in respect of the inn on the authority of *Reg.* v. *Lawrence and Others, Justices of Liverpool.* (1)

On behalf of the respondents it was contended that the appellant was not entitled to apply for a renewal of the licence formerly granted to Nutter, but only for a new licence, on the ground that he was not the person to whom the previous licence had been granted and had never held a licence in respect of the inn, and on the further ground that Nutter having been convicted of felony, his licence by reason of such conviction was forfeited or terminated, and was incapable of renewal.

The court of quarter sessions confirmed the decision of the respondents, subject to the present case, on the ground that there was no licence in existence in respect of the inn capable of renewal at the time of the general licensing sessions; had they not been of this opinion they would have granted the licence on the merits.

If the court was of opinion that the court of quarter sessions was correct in so holding, or if they considered that the contention of the respondents was well founded, the decision appealed against was to stand affirmed. Otherwise the decision was to be reversed.

James Paterson, and *W. H. B. Lindsell,* for the appellant. The justices were wrong in supposing that they had no power to grant a renewal. The statutes (2) do not contain any provisions

(1) 11 Q. B. D. 638.

(2) By 9 Geo. 4, c. 61, s. 14: "If any person duly licensed under this Act shall before the expiration of such licence die, or shall be by sickness or other infirmity rendered incapable of keeping an inn . . . or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house . . . it shall be lawful for the justices assembled as aforesaid at a special session holden under the authority of this Act for the division or place in which the house so kept or having been kept shall be situate . . . to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, . . . or

making it necessary in such a state of circumstances as those of the present case to apply for a new licence. The licence which had been held by Nutter was capable of renewal although Nutter himself was disqualified. The present case is concluded in the appellant's favour by the decision of the Court of Appeal in *Reg.* v. *Justices of Liverpool.* (1)

[They also referred to *Reg.* v. *Market Bosworth Licensing Justices* (2); *Reg.* v. *Justices of West Riding.* (3)]

H. D. Bonsey, and *H. W. Monckton*, for the respondents, were not called on.

FIELD, J. I am of opinion that the decisions of the justices at petty sessions and at quarter sessions were right, and that this appeal ought to be dismissed with costs.

In the year 1888, Nutter held an alehouse licence under the Licensing Act of 1828 (9 Geo. 4, c. 61). In January, 1888, Nutter was convicted of felony. Then under 3 & 4 Vict. c. 61, and 37 & 38 Vict. c. 49, s. 15, the owner of the premises applied to the justices in petty sessions for authority to carry on the business until the next special licensing sessions, and authority

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to any new tenant or occupier of any house having so become unoccupied . . . a licence to sell exciseable liquors by retail, to be drunk or consumed in such house or the premises thereunto belonging."

By 37 & 38 Vict. c. 49, s. 15: "Where any licensed person is convicted for the first time of any one of the following offences,—

"(1.) Making an internal communication between his licensed premises and any unlicensed premises;

"(2.) Forging a certificate under the 'Wine and Beerhouse Acts, 1869 and 1870;'

"(3.) Selling spirits without a spirit licence;

"(4.) Any felony;

and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a Court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in 'The Intoxicating Liquor Licensing Act, 1828,' with respect to the grant of a temporary authority and to the grant of licences at special sessions shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee."

(1) 11 Q. B. D. 638.

(2) 51 J. P. 438.

(3) 21 Q. B. D. 258.

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was granted until the sessions of April 6, 1888. At that sessions the appellant, who had become the tenant and occupier of the premises, applied for a transfer of the licence to himself, and his application was refused. He had no right then to act under the licence which had been held by Nutter, and he did not appeal from the refusal of the transfer. At the general annual licensing sessions in September, 1888, the appellant applied for a renewal of the licence which had been held by Nutter. He could have applied for a new licence, and if he had done so he would have got it, but he preferred to make the application for a renewal, probably because certain notices which would have to be given on any application for a new licence are not required where the application is for a renewal.

The application for renewal was made under the supposition that the decision of the Court of Appeal in *Reg.* v. *Justices of Liverpool* (1) applied to the present case. The appellant thought that he was tenant of premises in respect of which a licence had been granted which had become inoperative in consequence of the omission or neglect of the occupier to apply for renewal. I think that view is wrong, and that the present case is not within the decision in *Reg.* v. *Justices of Liverpool.* (1) There the purchaser of the freehold applied for a renewal of the licence which Mrs. Barker the previous occupier had neglected to apply for before she quitted, and the Court of Appeal held that the case came within s. 14 of the Licensing Act, 1828 (9 Geo. 4, c. 61), because Mrs. Barker had wilfully omitted or neglected to apply at the annual general licensing meeting for a renewal of the licence, and that the landlord could apply afterwards. But the present case comes within the earlier words in s. 14: "If any person duly licensed under this Act shall before the expiration of such licence die, or shall be by sickness or other infirmity rendered incapable of keeping an inn." The Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 15, points out what is to be done in such a case, and expressly provides that the application is to be made "to such next special sessions for the grant of a licence." The words in s. 14 of the Act of 1828, are "a special session," and if the legislature had meant the same thing in the Act of

(1) 11 Q. B. D. 638.

1874 they would have used the same words; they would have omitted the word "next" if it had been intended that the application might be made to any session. Mr. Paterson says that the words of s. 15 of the Act of 1874 are mandatory or directory, and unnecessary, but they must be intended to have some meaning, and we must give effect to the words used by the legislature.

CAVE, J. The first question is as to the construction of s. 15 of the Licensing Act, 1874. Mr. Paterson contends that the appellant was entitled to apply under that section. Under s. 14 of the Licensing Act, 1828, the application may be made at any time. That was decided in *Reg.* v. *Justices of Liverpool.* (1) The Master of the Rolls there said: "The case then having been brought within the terms of s. 14, the whole question is whether an efflux of time has happened which prevented the magistrates from having jurisdiction." (2) Then, after discussing the case of *Ex parte Todd* (3), he goes on to say: "It is admitted that there are no words which specifically put this limitation of time on the power of the justices; therefore we ought not to say that there is such a limitation, unless it is necessarily to be implied." (2) The Court in that case held as to s. 14 of the Act of 1828 that there was no limit of time; but s. 15 of the Act of 1874 does contain a limit; for it uses the words "a further application to such *next* special sessions for the grant of a licence." If the occupier of a public-house has been guilty of any of the four kinds of offences mentioned in that section, it is manifest that the business can no longer be carried on by him; and provision is made in the latter part of the section for an application to enable some other person to continue the business. But there is an express limit of time imposed by the words I have referred to; and therefore the ground of the decision in *Reg.* v. *Justices of Liverpool* (1) does not apply. If the provisions of s. 15 of the Act of 1874 had been enacted without mentioning any limit of time, Mr. Paterson's contention would be right; but it does contain an express provision, whereas s. 14 of the Act of 1828 contains no provision as to time. Then it is contended that s. 15 of

(1) 11 Q. B. D. 638. (2) 11 Q. B. D. at pages 645, 646.
(3) 3 Q. B. D. 407.

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the Act of 1874, by introducing the provisions of s. 14 of the Act of 1828, destroys itself, and does away with the limit of time which it would otherwise introduce. But to adopt this construction would be to give to a part of s. 15 no meaning whatever. Mr. Lindsell, on the other hand, says that he does not want s. 15 of the Act of 1874 for the purpose of his argument; for he contends that he is entitled to succeed on s 14 of the Act of 1828. It is not necessary to decide what would be the effect of s. 14 of the Act of 1828, if s. 15 of the Act of 1874 did not exist; but, assuming that the application could have been made under s. 14, we find that s. 15 defines the time at which the application is to be made. In the present case there would have been no difficulty in making the application in the manner provided by s. 15; and, if it had been made, it would have been successful. The applicant therefore had a complete remedy; and we ought not to put a wrong construction on an Act of Parliament in order to enable a man to escape the consequence of his own laches. For these reasons I am of opinion that the decision of the justices was right, and that our judgment ought to be in favour of the respondents.

Appeal dismissed.

Solicitors for appellant: *Nicholson, Graham, & Graham, for Mitchell & Webb, Bedford.*

Solicitors for respondents: *John Garrard & Allen, Olney.*

P. B. H.

HORNSEY LOCAL BOARD *v.* MONARCH INVESTMENT BUILDING SOCIETY.

1889
May 15.

Local Government Acts—Paving Expenses—Recovery of—Charge upon the Premises—Limitation of Actions—Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *ss.* 62, 63—*Real Property Limitation Act,* 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

Where a local authority had incurred expenses which by s. 62 of the Local Government Act, 1858 (corresponding to s. 257 of the Public Health Act, 1875), were made a charge upon the premises in respect of which the same were incurred:—

Held, that such expenses became a charge upon the premises at the date at which they were incurred, and that the period of twelve years limited by the Real Property Limitation Act, 1874, s. 8, commenced to run from that date.

APPEAL from county court.

In 1875 the local board, in pursuance of s. 69 of the Public Health Act, 1848 (1) and the Local Government Act, 1858, after

(1) 11 & 12 Vict. c. 63, s. 69: "In case any present or future street, or any part thereof (not being a highway) be not sewered, levelled, paved, flagged and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining or abutting upon such parts thereof as may require to be sewered, levelled, &c., require them to sewer, level, &c., the same within a time to be specified in such notice, and if such order be not complied with, the said local board may, if they think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided. . . ."

21 & 22 Vict. c. 98, s. 62: "Where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act, 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is the owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848, and such expenses shall be a charge on the premises in respect of which they were incurred and shall bear interest at the rate of 5*l.* per cent. till payment thereof."

63. "Notwithstanding anything in the Public Health Act contained in

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notices had been duly served and default made by the owners, completed certain paving works in respect, inter alia, of premises of the which the defendants subsequently became owners. The apportionment of the expenses so incurred was made in 1885, and notice thereof served on the defendants in 1886 and demand made in 1887. In 1888 this action was commenced in the county court under the Local Government Act (1858) Amendment Act, 1861 (1), for a declaration that the expenses incurred by the local board were a charge upon the premises and for a sale of the premises to give effect to such charge. The county court judge gave judgment for the local board.

The defendants appealed.

Montague Lush, for the defendants. The action is barred by s. 8 of the Real Property Limitation Act, 1874 (2). The twelve

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all cases where by such Act the local board shall have incurred expenses for the repayment whereof the owners of the premises for or in respect of which the same are incurred are made liable by the Public Health Act, 1848, or any Act incorporated therewith or by this Act, and such expenses have been settled and apportioned by the surveyors as payable by such owners, such apportionment shall be binding and conclusive upon such owner, unless within the expiration of three months from the time of notice being given by the local board or their surveyor of the amount of the proportion so settled by the said surveyor to be due from such owner, he shall by written notice dispute the same."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343 repeals the above cited Acts, but contains in ss. 150 and 257 provisions similar to the above.

(1) 24 & 25 Vict. c. 61, s. 24, providing that proceedings for recovery of demands below 20*l.* (extended by the Public Health Act, 1875, s. 261, to 50*l.*) which local boards may by law recover in a summary manner may be taken in a county court.

(2) 37 & 38 Vict. c. 57, s. 8: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

years commenced to run in 1875, when the works were completed. [He cited *Tottenham Local Board of Health* v. *Rowell* (1) and *In re Betteswortb & Richer*. (2)]

Macmorran, for the local board. The right to receive the amount did not accrue to any person capable of giving a discharge for the same within s. 8 of the Real Property Limitation Act, 1874, until after notice of the apportionment was served and demand made on the defendants. There is no time limited for making the apportionment: per Cockburn, J., in *Bradley* v. *Greenwich Board of Works* (3), and no demand can be made upon the owner until three months after service of notice of apportionment; there was therefore no liability and no right in any one to receive the amount or to give a discharge for it until that period had elapsed. [He also cited *In re Boor, Boor* v. *Hopkins*. (4)]

MATHEW, J. I am of opinion that this appeal must be allowed. The action was brought for a declaration that an apportionment in respect of paving expenses incurred in 1875 under the Public Health Acts was a charge upon the defendant's premises, and it was contended that these expenses did not become a charge upon the premises until the apportionment was made in 1885, and that therefore the Real Property Limitation Act, 1874, did not afford an answer to the action.

Under the Act of 1858 the person who was owner of the premises in respect of which paving expenses were incurred at the time that the works were completed was made personally liable for the apportionment of such expenses provided that certain steps were first taken, viz., notice served on the owner to do the necessary work, and on default made by him, then the local authority might do it, the amount expended was then to be apportioned by the surveyor upon the owners of the property in respect of which the expenses were incurred, and notice of this served upon each of them, and finally summary proceedings to establish the personal liability of the owners were to be instituted within six months of the demand of the amount apportioned. Mr. Macmorran founds upon this the contention that the section

(1) 15 Ch. D. 378.
(2) 37 Ch. D. 535.
(3) 3 Q. B. D. 384.
(4) 40 Ch. D. 572.

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providing that the expenses should be a charge upon the premises meant that the charge upon the premises came into existence at the time when the owner became personally liable, that is, upon the service of the notice and demand of the apportionment, and that the period of twelve years prescribed by the Real Property Limitation Act, 1874, commenced to run from that date. If this contention were sound, it would follow that the liability to pay these expenses might be transferred from the owner to his assign or heir or to some one else at any period of time after the expenses have been incurred, because the local authority could postpone the apportionment for any number of years and then enforce it as a charge upon the premises. This would be indeed an astonishing result of the statute, and entirely contrary to the policy of the Statutes of Limitation, and before we can put such a construction upon it we must be clear that this was the express intention of the legislature.

Now by s. 62 of the Local Government Act, 1858, the expenses are declared to be a charge on the premises in respect of which they are incurred. These words appear to create a charge upon the premises from the time when the expenses are incurred, and if that is the proper construction are in harmony with the Statute of Limitations. If we held the contrary, it would be necessary to alter s. 8 of the Real Property Limitation Act of 1874 in a most important particular. The material words of that section are: "No proceeding shall be brought to recover any sum of money charged upon or payable out of any land at law or in equity but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." In the present case the charge was created by the statute, and the right to receive the amount was vested in the local authority, who could at once have given a discharge for or release of the same in 1875, when the expenses were incurred.

In addition to these considerations we have also express authority to the same effect in the case of *In re Bettesworth and Richer* (1), in which the point was clearly raised, and it was decided that the apportioned expenses became a charge upon the

(1) 37 Ch. D. 535.

premises at the date of the completion of the work, that is, before the date of the apportionment.

GRANTHAM, J. I am of the same opinion. The case of *In re Boor* (1), relied upon for the plaintiffs, is not inconsistent with our decision. The point did not arise in that case, for Kay, J., decided only that as between the estate of the father, the tenant for life, and the son, the former was not liable for the amount of the expenses because the apportionment was not made in the father's lifetime, but he did not decide that the property in respect of which the liability was incurred could not have been made liable, but only that the son had no right against the father's estate, and in giving judgment he says: "It is clear that the enactments under which these works were done, do not create the relation of debtor and creditor between the person who was the owner at the time when the work was done and the local board." The son was really treating himself as assignee of a debt due from the father to the local board. In the case of *West* v. *Downman* (2) this very point was reserved by Jessel, M.R., who said: "Sect. 62 of the Local Government Act, 1858, as it appears to me, though I do not give a final opinion upon it, makes the person who at the time of the completion of the work is the owner of the property in respect of which the expenses have been incurred liable for the expenses, and they are made a charge upon the property," and Lord Esher used similar expressions: "Then as regards the second statute, the 62nd section never applied to the testator, for he was not the owner of the property when the work was completed." The liability was incurred at the time that the work was done, and the statute runs from that date. The plaintiff's remedy against the premises is therefore barred by the statute.

Appeal allowed.
Leave to appeal granted.

Solicitor for Plaintiff: *A. C. Tatham.*
Solicitors for Defendants: *W. H. Withall & Co.*

(1) 40 Ch. D. 572. (2) 14 Ch. D. 111, see p. 120.

W. A.

1889
Feb. 2;
May 18.

THE VESTRY OF ST. MARY, ISLINGTON, APPELLANTS; GOODMAN, RESPONDENT.

Metropolitan Building Acts—Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *s.* 26—*General Paving Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 72—*Street —General Line of Building—Projections—Pilaster encroaching on Public Footway.*

By 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), s. 72, power is given to the persons having the control of the pavements of streets in the metropolis to regulate and remove (inter alia) all projections from the fronts of houses which in their judgment are inconvenient or incommodious to passengers along the footways; and a penalty is imposed upon any owner or occupier who refuses or neglects to remove any such projection after notice.

By s. 26 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), "The following rules shall be observed as to projections, ... (2.) In any street or alley of a greater width than thirty feet any shop front may project ten inches and no more. (5.) Except in so far as is permitted by this section in the case of shop fronts, and with the exception of . . . . window dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street, except with the permission of the Metropolitan Board of Works. . . . ."

The respondent built upon one side of a public street four houses or shops upon four plots of ground of which he was lessee, and erected against the fronts of them five stone pilasters, forming parts of shop fronts, the bases of which pilasters encroached upon the public footway to the extent of six inches in depth. The appellants, having passed a resolution declaring the pilasters to be inconvenient and incommodious to passengers along the footway, served the respondent with a notice to remove them, and upon his default took out a summons against him under s. 72 of Michael Angelo Taylor's Act for not removing them. The magistrate dismissed the summons.

Held (by Denman and Hawkins, JJ., Lord Coleridge, C.J., dissenting), that s. 26 of the Metropolitan Building Act, 1855, did not amount to a repeal pro tanto of s. 72 of Michael Angelo Taylor's Act; that it only authorized projections in cases where but for a statutory prohibition they would be lawful, and did not authorize projections which would interfere with the user by the public of a public footway; and that the decision of the magistrate was wrong.

CASE stated by a Metropolitan police magistrate.

A summons had been taken out by the appellants against the respondent under 57 Geo. 3, c. xxix. (the General Paving (Metropolis) Act, 1817), charging him with not having removed to the satisfaction of the appellants "five pilasters, being fixed projections from the fronts of houses, shops, or buildings now in course of erection by you over and upon the public footway, on the east

side of Upper Street, which projections are, in the judgment of the vestry inconvenient and incommodious to passengers along the said footway, as required by a notice served upon you. . . . ."

Upper Street was a street of a width greater than thirty feet, which had been widened and improved by the Metropolitan Board of Works, and the roadway and pavements of the street as widened and improved had been thrown open to the public and handed over to the appellants for the purposes of control.

The respondent was lessee from the Metropolitan Board of Works of four building plots abutting on the east side of the street, and the respondent was building on them four houses or shops, and plans shewing the nature and extent of the intended buildings had been approved by the Metropolitan Board of Works. The respondent had erected against the fronts of his buildings five stone pilasters, the bases of which encroached upon the public footway to the extent of six inches in depth. The appellants had passed a resolution declaring the pilasters to be in their judgment inconvenient and incommodious to passengers along the footway, and directing proceedings to be taken against the respondent in default of his complying with a notice to remove them. In accordance with this resolution a notice had been served upon the respondent requiring him entirely to remove the pilasters to the satisfaction of the appellants, but he did not comply with the notice and refused to remove the pilasters.

The respondent contended that he was not bound to remove the pilasters on the ground that they were projections which he had a right to maintain under s. 26 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122).

The appellants contended that the respondent had committed an offence against s. 72 of 57 Geo. 3, c. xxix; that that section was not affected by s. 26 of the Metropolitan Building Act, 1855; that the pilasters were not projections within the meaning of the last mentioned section; and that the said section did not empower the erection of any encroachment upon any public footway.

The magistrate was of opinion that the pilasters were projections within the meaning of 18 & 19 Vict. c. 122, s. 26, and were window dressings within that section, and were consequently authorized by that section, notwithstanding the fact that they

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encroached upon the public footway, and he dismissed the summons. The question for the Court was whether his decision was right in point of law. (1)

1889. Feb. 2. *R. Vaughan Williams, Q.C.* (*J. V. Austin*, with him), for the appellants. The jurisdiction conferred by Michael Angelo Taylor's Act for the regulation of streets in the metropolis is now vested in the vestries and district boards, and the vestry having found that the projections were inconvenient and incommodious within the meaning of s. 72 of that Act, s. 26 of the Act of 1855 does not apply. The effect of Michael Angelo Taylor's Act is to prevent any projection beyond the general line of buildings, and s. 26 of the Act of 1855 does not operate as a repeal pro tanto of the provisions of that Act, nor does it affirmatively authorize work of such a nature. If the decision of the magistrate is right, s. 26 amounts to a positive enactment enabling an owner or occupier to make projections upon the highway or upon his neighbour's land; but the operation of the section cannot be extended beyond cases where the houses which are being erected are not on the edge of the building line, or where a street is wholly situated on one person's property. It was not intended to repeal an existing Act, and the two statutes when properly looked at are perfectly consistent with each other.

(1) By 57 Geo. 3, c. xxix., s. 72, power is given to the persons having the control of the pavements of streets in the Metropolis to regulate or remove (inter alia) all fixed or moveable projections from the fronts or sides of houses which in their judgment are inconvenient or incommodious to passengers along the carriage or footways; and a penalty is imposed upon any owner or occupier who refuses or neglects to remove any such projection to the satisfaction of the persons having the control of the pavements after notice from them so to do.

By s. 26 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), "The following rules shall be observed as to projections:—

"(2.) . . . . In any street or alley of a greater width than thirty feet any shop front may project ten inches and no more.

"(5.) Except in so far as is permitted by this section in the case of shop fronts, and with the exception of . . . . window dressings and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street, except with the permission of the Metropolitan Board of Works. . . . ."

Horace Browne, for the respondent. This is a window dressing or shop-front, and is within the amount of projection allowed by s. 26 of the Metropolitan Building Act, 1855. That section creates an exception in favour of a shop front, even in cases where it interferes with the direct and free passage of the public along the footpath. The section extinguishes the easement of the public over that part of the highway on which the pilasters are placed, for a public right of way may be extinguished by statute by necessary implication as well as by express words: *Corporation of Yarmouth* v. *Simmons.* (1) The two statutes are inconsistent with each other, and Michael Angelo Taylor's Act is pro tanto repealed by the later Act.

[He also cited *Lord Auckland* v. *Westminster District Board of Works* (2); *Goldstraw* v. *Duckworth* (3); *Reg.* v. *Ingham.* (4)

R. Vaughan Williams, Q.C., in reply. Sect. 26, sub-s. 5, of the Act of 1855 contains a statutory prohibition against making projections beyond the general building line, and limits the exercise of the common law rights of a building owner; it is practically a re-enactment of s. 143 of the Metropolis Management Act, 1855, which forbids the erection of buildings beyond the general building line.

Cur. adv. vult.

1889. May 18. The following judgment was read by

HAWKINS, J. The facts of the case are simple enough. The respondent was the lessee, under the late Metropolitan Board of Works, of some plots of building land abutting on to the east side of Upper Street, Islington, which is a street of greater width than thirty feet, and which, having been widened and improved by the Metropolitan Board of Works under the powers vested in that body by the Metropolitan Streets Improvements Act, was on the 21st of January, 1888, both as regards the roadway and pavements, thrown open to the public and handed over to the appellants, the vestry of St. Mary's, Islington, for the purposes of control. Upon these plots of land the respondent, after the street was so thrown open, constructed certain buildings

(1) 10 Ch. D. 518.
(2) Law Rep. 7 Ch. 597.
(3) 5 Q. B. D. 275.
(4) 17 Q. B. 884.

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Hawkins, J.

intended for houses or shops; the plans of which, though submitted to and approved by the Metropolitan Board of Works in its character as lessor, received no approval from the Board acting in its official capacity.

Against the fronts of these buildings the respondent erected stone pilasters forming parts of shop fronts the bases of which rest and encroach upon and into the public footway, each to the extent of six inches, and to the extent of eighteen inches in width along the street, rendering the footway inconvenient and incommodious to passengers passing along it. Under s. 72 of 57 Geo. 3, c. xxix., the General Paving (Metropolis) Act, 1817 (commonly called Michael Angelo Taylor's Act) the appellants required the respondent to remove the said pilasters, and in default of his complying with such request, they instituted proceedings before Mr. Barstow, one of the police magistrates of the Metropolis, to enforce the penalties imposed by the last-mentioned Act in respect of such default.

Before the magistrate the respondent contended that he was justified in making the encroachments complained of under s. 26 of the Metropolitan Building Act, 1855, and the learned magistrate held that he was so justified; notwithstanding the fact that they encroached upon and interfered with the public footway. The question raised by this case is whether that decision was right in point of law.

Such being the only question reserved for our opinion, and being of opinion that the magistrate was wrong, I will proceed to state my reasons for coming to that conclusion.

Primâ facie a public footway, as the footway encroached upon was by the case found to be, cannot legally be interfered with by any person to the prejudice of the public who have a right to use it for the purpose of passage; not even though the soil upon which it is made be the freehold of the encroacher, which here it was not alleged to be, though, of course, by Act of Parliament the right of the public may be destroyed for any reason which to the legislature may seem good, even for the mere benefit of a private individual. It is, however, very difficult to suppose that an Act of Parliament having for its sole object, as the Metropolitan Buildings Act undoubtedly had, the interests of the public

at large, would without adequate, indeed, without any, consideration or compensation, and for the mere benefit of a private individual, allow him to add to his own land and appropriate to his own use land not belonging to himself, but which had been devoted and dedicated to the use of the public, and thus deprive the public of that, the loss of which was calculated to cause inconvenience and annoyance to thousands of Her Majesty's subjects. Let us see whether Parliament has sanctioned so grave an interference with so valuable and important a public right as a public footway in so populous a district as this undoubtedly is.

By the enactment relied on for the respondent, the 18 & 19 Vict. c. 122, s. 26: "The following rules shall be observed as to projections:" Sub-s. 2. "In streets or alleys of a less width than thirty feet any shop front may project beyond the external wall of the building to which it belongs for five inches and no more, and any cornice of any such shop front may project thirteen inches and no more; and in any street or alley of a width greater than thirty feet any shop front may project ten inches and no more, and the cornice may project for eighteen inches from the external walls, but no more."

Now, does this sub-section—for this is the only enactment pointed out, or relied on, in support of the respondent's contention—legalize the encroachment complained of? The appellants say it does not, and contend, and I think rightly, that it does not authorize the making of any projections in cases in which they could not otherwise be legally made, but only authorizes them in cases in which they could be lawfully made but for some restriction imposed by Act of Parliament; that is to say, upon the party's own land, or land which irrespective of any Act of Parliament he could lawfully utilize for the purpose. In advancement of this view sub-s. 5 of s. 26 was read by the learned counsel for the appellants, such sub-section being as follows "Except in so far as is permitted by this section in the case of shop fronts and with the exception of . . . . window dressings and other like architectural decorations no projection from any building shall extend beyond the general line of fronts in any street, except with the permission of the Metropolitan Board of Works."

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What was the real object of these provisions is to my mind conclusively shewn by reference to some few sections of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), which received the royal assent on the same day as the Building Act, and which must be read in conjunction with it.

Now by the Metropolis Local Management Act, after providing for the constitution of vestries and district boards and the incorporation of the Metropolitan Board of Works, and transferring generally to such vestries and district boards all authority in relation to paving, lighting, watering, cleansing, or improving any parish and all the powers of surveyors of highways, by s. 119 authority was conferred upon such vestries and district boards to remove or to require the removal of any projection or obstruction placed or made against or in front of any house or building after the commencement of that Act which should be an annoyance in consequence of the same projecting into or being made in or endangering or rendering less commodious the passage along any street, and in the event of a refusal to comply with such request a penalty was imposed upon the person so refusing. Then by s. 120 power was given to such vestries and district boards to remove any such projections or obstructions which were existing at the time of the commencement of the Act; but where such projections then lawfully existed, reasonable compensation was to be made to the person affected by such removal. The effect of these two sections was, in all cases where such projections were unlawful to compel their removal absolutely, but in cases where at the time of the commencement of the Act projections existed which though annoyances were nevertheless lawful at the time of their erection, such as projections beyond the line of frontage made on the parties' own land, then such removal could only be enforced on compensation to the owner. By s. 144 the Metropolitan Board of Works had power to make, widen or improve any streets, roads, or ways, and by s. 143 "No building shall without the consent in writing of the Metropolitan Board of Works be erected beyond the regular line of buildings in the street in which the same is situate, in case the distance of such line of buildings from the highway do not exceed thirty feet, or within thirty feet of the highway where the distance of the

line of buildings therefrom amounts to or exceeds thirty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway." This section clearly imposes restraint upon those who are building and forbids the erection of any projection beyond the regular line of building in the street within thirty feet of the highway even though there be land of which the builder is owner and occupier intervening between the line of buildings and the highway. In other words the section is a restraint upon an owner of land from building upon that land beyond the regular line of buildings in the street. If after reading this section of the Metropolis Management Act, 1855, which by the way comes first in order in the Statute Book (being c. 120 of 18 & 19 Vict.), one reads s. 26 of the Building Act, which is c. 122, it seems to my mind clear that the object of sub-s. 2 of the latter section, which I have already set forth at length, was merely to make a limited exception in favour of shop fronts, whilst sub-s. 5 substantially re-enacted the 143rd section of the Metropolis Management Act.

In neither of these Acts is there the slightest trace of any intention on the part of the legislature to confer any right on a person proposing to build to do so except entirely upon his own land; or to build to any extent at his own mere will, and without notice to anybody, upon a public footway, so as to deprive the public of that free and convenient passage along it to which they were by law entitled. If it had been the intention of the legislature to confer such a right, or to legalize what otherwise would be a public indictable nuisance, I should have expected such intention to have been expressed in clear unmistakeable language.

I do not feel it necessary at length to refer to other sections in either of the Acts to which I have referred, but I do desire generally in a few words to call attention to the objects these Acts had in view.

The Metropolis Local Management Act was intended to vest in the appointed bodies authority over sewers, to enable them to compel sanitary arrangements, to have control over the public streets with a view to secure proper paving, lighting, and cleansing, and to prevent nuisances thereon, and to compel uni-

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formity of appearance in the street. In *Tear* v. *Freebody* (1) Crowder, J., referring particularly to s. 143 said (2), "the object of this part of the Act evidently was the maintaining an appearance that should be ornamental," and Willes, J. (3), said "the regular line of building substantially means such a line as shall preserve uniformity of appearance." The building Act had other objects for its aim, namely the making provision for the safety and security of the buildings which might be erected, not only with a view to the interests of the public at large, but having regard to the interests of adjoining owners—thus it regulated the size and height of the buildings, the construction, the materials to be used, and the demolition of dangerous structures, etc., etc. But neither in the one Act nor in the other is a syllable to be found conferring upon a private individual a right to invade, at his own mere will and pleasure, either a public or a private right. Even a hoarding for the purpose of building or for effecting necessary repairs cannot be erected without a licence from the vestry or district board.

In course of the argument several cases were cited, none of them in my judgment bearing upon the point before us, though in one of them, *Reg.* v. *Ingham* (4), one or two expressions are to be found which fortify me in the opinion I have formed. In that case a rule had been granted calling upon Mr. Ingham, one of the police magistrates, to shew cause why he should not adjudicate upon an information laid by the surveyor of pavements under the 72nd section of the above mentioned statute, 57 Geo. 3, c. xxix., against one McIntyre, who was the occupier of a house within a district of the paving commissioners, who had from time to time paved and repaved the street up to the walls of the said house. McIntyre, being desirous of rebuilding his house, pulled down and rebuilt part of the external wall, and it being then found that certain pilasters, etc., forming part of the new work, projected over the public footway and pavement and beyond the line of the old wall to the extent of eight inches, the commissioners gave him notice to remove so much of the "Wooden shop front . . . and so much of the pilasters, framing, or other projec-

(1) 4 C. B. (N.S.) 228.
(2) At p. 259.
(3) At p. 263.
(4) 17 Q. B. 884.

tions of or from the said shop front . . . as projects over the footway of the last-mentioned street." This notice not having been complied with, the information was lodged. When this information came on to be heard it was, among other things, contended on behalf of McIntyre that the case did not come within the 57 Geo. 3, c. xxix., and the learned magistrate declined to adjudicate on the ground that he had no jurisdiction, whereupon a rule nisi was obtained to compel him to do so. In shewing cause against it, the Building Act (7 & 8 Vict. c. 84) Schedule E, was referred to as containing a provision respecting projections substantially like that contained in the 2nd sub-section of s. 26 of the Building Act of 1855, and it was urged that the Act of 57 Geo. 3 was superseded by the Building Act, and that the matter ought to be determined by official referees appointed under s. 80 of that Act.

In this judgment it is true that nothing is to be found which can be said to be a direct authority upon the point in question —the decision was merely that the 57 Geo. 3 was not superseded, and that the learned magistrate ought to hear and determine the information—but throughout the case no real doubt seems to have been entertained that if there was an encroachment on the public footway it was illegal, the only question seriously discussed being as to the tribunal before which the matter should be brought. In giving his judgment, however, Lord Campbell said: "If the intention had been to repeal existing powers for preventing encroachments on the streets by buildings, either by projections or otherwise, so important a repeal ought to have been expressed;" and with reference to the suggested tribunal of official referees he said it was "ill-adapted for trying whether an alleged right of way exists or has been encroached on;" as if those were the only questions to be determined. Here both those facts are found by the case. *Lord Auckland* v. *Westminster District Board* (1) has no bearing whatever upon the present case: the question there raised was whether valid reasons existed against Lord Auckland building upon his own land, not whether he had a right to build on a public footway, a right he never claimed.

Goldstraw v *Duckworth* (2) turned entirely upon the provisions

(1) Law Rep. 7 Ch. 597. (2) 5 Q. B. D. 275.

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of a local Act of Parliament for the regulation of buildings in Liverpool. The only point decided was that a section in the Act enacting that "no projection of any kind shall be made in front of any building over or upon the pavement of any street" did not apply to an oriel window which, though it projected over the pavement, did not cause any obstruction to the free use of the footway. In giving the judgment of the Court, Lush, J., said, "if it had been intended to prevent projections at any height over the footpath, one would have expected to find an exception in favour of these little harmless projections, as well as of shop-fronts and doorways;" so here, if it had been intended to give power to encroach on an important public right by building on a public footway, one would have expected to find such power clearly expressed in words, as was the case in an exception in the Local Act in question to which Lush, J., referred.

The last case to which I think it right to refer is that of the *Corporation of Yarmouth* v. *Simmons* (1), before Fry, J., which, to use the words of that learned judge, only decided that "when the legislature clearly and distinctly authorize the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone, because the thing cannot be done without abrogating the right." In this proposition I entirely agree, but it does not apply to the present case, for the legislature in the 26th section of the Building Act, 1855, has not clearly and distinctly authorized the building upon the footway as suggested. On the contrary, I think the language of the section is incapable when properly considered of bearing any such construction, but is applicable only to such a projection as would have been lawful before restraint was imposed by Parliament upon projections beyond the general line of frontage, even though such projections were upon the builder's own land. Even if the words could be made to bear such a construction I have no hesitation in saying they are capable also of that construction which I have put upon them, and which I have no doubt the legislature intended they should bear; and even if the interpretation put upon the words were the natural interpretation of the words when read alone, yet having regard to the context or

(1) 10 Ch. D. 518.

contemporaneous enactments touching upon the same matters (as the two Acts in question of 1855 do), it is clear that the strict literal construction ought not to prevail against the clear and obvious intentions of those who passed the enactment, as was said by Holroyd, J., in *Rex* v. *Birmingham Canal Company.* (1)

To sum up shortly the view I have endeavoured to explain, the case stands thus: Before the passing of the Metropolis Local Management Act a building-owner might build upon his own land up to its extreme boundary, regardless of any general line of building, but he could not build or otherwise encroach upon a public footpath so as to obstruct the passage along it without rendering himself liable to an indictment for a nuisance. By the 143rd section of the Management Act he was compelled, even within his own land, to confine his building within the general line of building in the street, unless he had the consent of the Metropolitan Board of Works to build beyond it; but even with such consent he could not extend his building beyond his own boundary, nor infringe upon the right of the public or of other persons. Sect. 26, sub-s. 2, of the Building Act authorized him to extend a shop front beyond the line of buildings to a limited extent without the leave of anybody, but gave him no greater right or privilege than he would have had if neither of these Acts had ever come into existence.

I am therefore clearly of opinion that the magistrate was wrong in holding that the encroachments in question were authorized by s. 26 of the Building Act. No other question being submitted for our consideration it is unnecessary to travel through the various Acts of Parliament by which the parish of St. Mary, Islington, became subject to the provisions of the Act 57 Geo. 3, c. xxix., nor to consider how far the powers of the paving authorities mentioned in that Act became vested in the appellants, nor to discuss critically the provisions of that Act, nor to point out how or when the street and footway mentioned in the case became a public street or footway, for it is found to be such in the case, nor to wade through the many amending Acts which have been passed since 1855, and which do not affect the question before us, nor to discuss the numerous authorities to be

(1) 2 B. & Ald. 570, at p. 581.

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found in the books, in which the facts do not really, though to some extent they do apparently, resemble those in the present case, and in none of which has the question now raised been argued or decided, nor any principle laid down to guide us. I have purposely abstained, therefore, from entering upon any such inquiries and have contented myself with simply answering the one question upon which our opinion is asked.

In the result I think our judgment ought to be for the appellants.

In this judgment my brother Denman agrees.

LORD COLERIDGE, C.J. I am sorry that I do not agree in the judgment of my learned Brothers. If I thought it was necessary to go into the considerations which my learned Brother has gone into, I am very far indeed from saying that I might not arrive at the same conclusion at which he has arrived; but I do not think it necessary to go into those considerations, because the matter appears to me to be a very simple one, and to be determinable, and determinable only, by a consideration of two sections of two Acts of Parliament.

The first thing to be considered is whether primâ facie this is an obstruction which is unlawful, and which may be abated under the powers of Michael Angelo Taylor's Act. The 72nd section of that Act undoubtedly, if unqualified by the Act of Parliament to which I shall in a moment refer, would make this projection unlawful and by proper means removeable. That Act, although originally applicable only to a single parish, has by subsequent legislation been made a general Act, and it has been decided by a case which binds me, and which I have not the slightest objection to be bound by, that it is still in force. If therefore Michael Angelo Taylor's Act stood alone, on the facts of this case I should think the magistrate was wrong. But Michael Angelo Taylor's Act does not stand alone; it has been qualified (to what extent I will explain in my judgment in a moment) by the 18 & 19 Vict. c. 122, s. 26. That is the Act which regulates buildings in the metropolis, and so far as it is inconsistent with the provisions of Michael Angelo Taylor's Act, the last-named Act must be taken upon well-known principles to be overruled.

Now the words of the section are perfectly general. "The following rules shall be observed as to projections: a shop front may project ten inches, and no more," and in this case it has been shewn that the shop fronts projects not ten inches, but only six. If therefore this section applies to this particular projection the magistrate is clearly right and the projection cannot be interfered with. It has been contended, and that is the argument which lies at the foundation of the very able and elaborate judgment of my learned Brother, that this section only authorizes projections which would be in themselves lawful but for some statutory prohibition and for some restraint placed by statute upon a man's enjoyment of his own land. Now I do not at all doubt that there are such restraints, and I do not at all doubt, if it is necessary to discuss it, the wisdom and extreme propriety in a great city, or indeed in any collection of houses where the subject-matter is building in a line of street, of interfering to a limited extent with the general right of property, because in a street where there is a collection of houses, a man's private rights of property must to a limited extent, if it is necessary, be curtailed for the public good. Therefore I do not at all doubt that there are statutes, qualified by other statutes, which restrain, and permit interference with, a man's right to build upon his own land, and if that were all that this statute did, the conclusion arrived at by my learned Brother would follow. Granting the premiss of my learned Brother, one must grant the conclusion; but it is upon the premiss that I fail to follow my learned Brother's reasoning. I do not grant the premiss that this is only a statutory enlargement or relief from a statutory provision. The words are perfectly general; they are found in a Building Act, and they sanction a very small projection, ten inches at the outside. I cannot but think that the public inconvenience, of which so much has been made, has been a little overstated. The amount of projection allowed is a small matter, and it seems to me that the section may very well have been intended, and in my judgment it was intended, to favour traders and shopkeepers in a place like London to that small extent. In the case of shop fronts they may encroach ten inches; that is what the statute says. It seems to me a very reasonable limit for the

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statute to give, and I am unable to see, I confess, the statutory prohibition upon which this is a statutory relief. Unless, therefore, these words can be satisfied by its being shewn to be against a statutory prohibition, I do not think the generality of the words of the statute can be satisfied. I have read with great care and with great attention the judgment of my learned Brother, but it has entirely failed to satisfy me that the generality of these words can be given effect to except by supposing that they are meant to apply to all cases, to cases of a man building on public land as well as a man building on his own land. For this short reason I have been unable to come to the same conclusion as my learned Brother, and I think the magistrate was right.

Judgment for the appellants.

Solicitors for appellants: *William Lewis.*
Solicitor for respondent: *W. Stevens Lewis.*

W. J. B.

Jan. 26; *May* 11.

[CROWN CASE RESERVED.]

THE QUEEN *v.* TOLSON.

Criminal Law — Bigamy — Mens Rea — Second Marriage where Husband or Wife absent for less than Seven Years — Honest Belief on reasonable Grounds of Death of Husband or Wife — 24 & 25 *Vict.* c. 100, *s.* 57.

The prisoner was convicted under 24 & 25 Vict. c. 100, s. 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead:—

Held, by Lord Coleridge, C.J., Hawkins, Stephen, Cave, Day, A. L. Smith, Wills, Grantham and Charles, JJ. (Denman, Field, and Manisty, JJ., and Pollock and Huddleston, BB., dissenting), that a bonâ fide belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong.

CASE stated by Stephen, J., and reserved by the Court for the consideration of all the judges.

At the summer assizes at Carlisle in 1888 the prisoner Martha Ann Tolson was convicted of bigamy.

It appeared that the marriage of the prisoner to Tolson took place on September 11, 1880; that Tolson deserted her on

December 13, 1881; and that she and her father made inquiries about him and learned from his elder brother and from general report that he had been lost in a vessel bound for America, which went down with all hands on board. On January 10, 1887, the prisoner, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were all known to the second husband, and the ceremony was in no way concealed. In December, 1887, Tolson returned from America.

Stephen, J., directed the jury that a belief in good faith and on reasonable grounds that the husband of the prisoner was dead would not be a defence to a charge of bigamy, and stated in the case that his object in so holding was to obtain the decision of the Court in view of the conflicting decisions of single judges on the point. The jury convicted the prisoner, stating, however, in answer to a question put by the judge, that they thought that she in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage, and the judge sentenced her to one day's imprisonment.

The question for the opinion of the Court was whether the direction was right. If the direction was right, the conviction was to be affirmed; if not, it was to be quashed.

1889. Jan. 26. *A. Henry*, for the prisoner. The question turns on the construction of 24 & 25 Vict. c. 100, s. 57, which reproduces with slight and immaterial variation of language 9 Geo. 4, c. 31, s. 22, and 1 Jac. 1, c. 11, by which latter statute bigamy was first made felony and removed from the cognizance of the Ecclesiastical Courts. At that time the offence was punishable with death, and it is difficult to believe that in 1603 the legislature intended that a man or woman re-marrying under a bonâ fide and reasonable belief that the other party was dead should be liable to capital punishment. Sect. 57 should be construed in accordance with the well-known principle of English criminal law that in order to constitute crime there must be a mens rea, or guilty intention: non est reus, nisi mens sit rea. It is true that the legislature may for its own reasons dispense in any given case with the necessity for a mens rea, and may constitute certain

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acts crimes in themselves; but this it generally does in very clear language. In the present case the jury have found that there was no mens rea, and the language of the section is not such as to indicate that a mens rea is not essential to the crime of bigamy.

Apart from the fact that the maxim "ignorantia facti excusat" is applicable to the case, the word "felony" in itself involves the idea of a mens rea; a person cannot innocently commit a felony; Co. Litt. 391 a; Hawkins' Pleas of the Crown, bk. 1, c. 25; Termes de la Ley, tit. Felony.

The effect of the proviso in s. 57 is merely to raise a presumption of death after an absence of seven years, during which the other party to the marriage has not known that the absent husband or wife was living. This presumption is wholly different from the ground taken in the present defence, which is based on a reasonable bonâ fide belief of the death of the husband, excluding all possibility of the existence of a mens rea. After the seven years there is a legal presumption of death, and the burden of proof is on the prosecution; while the seven years are running the burden of proof is on the prisoner, and honest and reasonable belief in the death of the husband or wife is a good defence.

The case of *Reg.* v. *Prince* (1), when rightly considered, is in favour of the prisoner. The result of that decision is in no sense to displace the doctrine of the necessity for a mens rea as a general proposition of criminal law, at least in cases where the act is done under a belief of the existence of a state of facts which, if it really existed, would render the act not criminal nor immoral. In that case the prisoner knew that in taking the girl away from her father he was, altogether apart from the question of her age, doing an improper and immoral act, while in the present case there was nothing wrong in the remarriage of the prisoner, who supposed herself to be a widow. Nor is the doctrine of mens rea in any way affected by the decisions on statutes for the protection of the revenue or of game, or the Licensing Acts, &c., in which certain acts are constituted ipso facto crimes, for in all cases it is a question of construction whether the particular statute excludes the general doctrine of mens rea.

(1) Law Rep. 2 C. C. R. 154.

The question has frequently arisen before single judges, and the cases of *Reg.* v. *Turner* (1), *Reg.* v. *Horton* (2), and *Reg.* v. *Moore* (3), are in the prisoner's favour, while *Reg.* v. *Gibbons* (4) and *Reg.* v. *Bennett* (5) are to a contrary effect; it seems, however, impossible to reconcile the language of Brett, J., in *Reg.* v. *Prince* (6) and in *Attorney-General* v. *Bradlaugh* (7) with his decision in *Reg.* v. *Gibbons.* (4)

No counsel appeared to argue on behalf of the Crown.

Cur. adv. vult.

1889, May 11. WILLS, J. In this case the prisoner was convicted of bigamy. She married a second time within seven years of the time when she last knew of her husband being alive, but upon information of his death, which the jury found that she upon reasonable grounds believed to be true. A few months after the second marriage he reappeared.

The statute upon which the indictment was framed is the 24 & 25 Vict. c. 100, s. 57, which is in these words: "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, punishable with] penal servitude for not more than seven years, or imprisonment with or without hard labour for not more than two years," with a proviso that "nothing in this Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time."

There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past.

It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the

(1) 9 Cox, C. C. 145.
(2) 11 Cox, C. C. 670.
(3) 13 Cox, C. C. 544.
(4) 12 Cox, C. C. 237.
(5) 14 Cox, C. C. 45.
(6) Law Rep. 2 C. C. R. 154.
(7) 14 Q. B. D. 667, at p. 689.

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mind of the person doing the act in question be innocent. "It is a principle of natural justice and of our law," says Lord Kenyon, C.J., "that actus non facit reum, nisi mens sit rea. The intent and act must both concur to constitute the crime:" *Fowler* v. *Padget.* (1) The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute—fornication or seduction, for instance—which nevertheless no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of justice and, indeed, the foundations of civil society rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen.

Although primâ facie and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes

(1) 7 T. R. 509, 514.

an offence and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had bonâ fide made an accidental miscalculation or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable. There is no difference for instance in the kind of language used by Acts of Parliament which made the unauthorized possession of Government stores a crime, and the language used in bye-laws which say that if a man builds a house or a wall so as to encroach upon a space protected by the bye-law from building he shall be liable to a penalty. Yet in *Reg.* v. *Sleep* (1) it was held that a person in possession of Government stores with the broad arrow could not be convicted when there was not sufficient evidence to shew that he knew they were so marked; whilst the mere infringement of a building bye-law would entail liability to the penalty. There is no difference between the language by which it is said that a man shall sweep the snow from the pavement in front of his house before a given hour in the morning, and if he fail to do so shall pay a penalty; and that by which it is said that a man sending vitriol by railway shall mark the nature of the goods on the package on pain of forfeiting a sum of money; and yet I suppose that in the first case the penalty would attach if the thing were not done, whilst in the other case it has been held in *Hearne* v. *Garton* (2) that where the sender had made reasonable inquiry and was tricked into the belief that the goods were of an innocent character, he could not be convicted, although he had in fact sent the vitriol not properly marked. There is no difference between the language

(1) L. & C. 44; 30 L. J. (M.C.) 170. (2) 2 E. & E. 66.

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by which it is enacted that "whosoever shall unlawfully and wilfully kill any pigeon under such circumstances as shall not amount to a larceny at common law" shall be liable to a penalty, and the language by which it is enacted that "if any person shall commit any trespass by entering any land in the daytime in pursuit of game" he shall be liable to a penalty; and yet in the first case it has been held that his state of mind is material: *Taylor* v. *Newman* (1); in the second that it is immaterial: *Watkins* v. *Major*. (2) So, again, there is no difference in language between the enactments I have referred to in which the absence of a guilty mind was held to be a defence, and that of the statute which says that "any person who shall receive two or more lunatics" into any unlicensed house shall be guilty of a misdemeanour, under which the contrary has been held: *Reg.* v. *Bishop*. (3) A statute provided that any clerk to justices who should, under colour and pretence of anything done by the justice or the clerk, receive a fee greater than that provided for by a certain table, should for every such offence forfeit 20*l*. It was held that where a clerk to justices bonâ fide and reasonably but erroneously believed that there were two sureties bound in a recognizance besides the principal, and accordingly took a fee as for three recognizances when he was only entitled to charge for two, no action would lie for the penalty. "Actus," says Lord Campbell, "non facit reum, nisi mens sit rea. Here the defendant very reasonably believing that there were two sureties bound, beside the principal, has not, by making a charge in pursuance of his belief, incurred the forfeiture. The language of the statute is 'for every such offence.' If, therefore, the table allowed him to charge for three recognizances where there are a principal and two sureties, he has not committed an offence under the Act:" *Bowman* v. *Blyth*. (4)

If identical language may thus be legitimately construed in two opposite senses, and is sometimes held to imply that there is and sometimes that there is not an offence when the guilty mind is absent, it is obvious that assistance must be sought aliunde, and that all circumstances must be taken into consideration

(1) 4 B. & S. 89.
(2) Law Rep. 10 C. P. 662.
(3) 5 Q. B. D. 259.
(4) 7 E. & B. 26, 43.

which tend to shew that the one construction or the other is reasonable, and amongst such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight if the words be incapable of more than one construction; but I have, I think, abundantly shewn that there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognised as a matter fairly to be taken into account. In a case in which a woman was indicted under 9 & 10 Wm. 3, c. 41, s. 2, for having in her possession without a certificate from the proper authority Government stores marked in the manner described in the Act, it was argued that by the Act the possession of the certificate was made the sole excuse, and that as she had no certificate she must be convicted. Foster, J. said, however, that though the words of the statute seemed to exclude any other excuse, yet the circumstances must be taken into consideration; otherwise a law calculated for wise purposes might be made a handmaid to oppression, and directed the jury that if they thought the defendant came into possession of the stores without any fraud or misbehaviour on her part they ought to acquit her. (1) This ruling was adopted by Lord Kenyon in *Rex* v. *Banks* (2) who considered it beyond question that the defendant might excuse himself by shewing that he came innocently into such possession, and treated the unqualified words of the statute as merely shifting the burden of proof and making it necessary for the defendant to shew matter of excuse, and to negative the guilty mind instead of its being necessary for the Crown to shew the existence of the guilty mind. Primâ facie the statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned. Suppose a man had taken up by mistake one of two baskets exactly alike and of similar weight, one of which contained

(1) Foster's Crown Law, 3rd ed. App. pp. 439, 440. (2) 1 Esp. 144.

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innocent articles belonging to himself and the other marked Government stores, and was caught with the wrong basket in his hand. He would by his own act have brought himself within the very words of the statute. Who would think of convicting him? And yet what defence could there be except that his mind was innocent, and that he had not intended to do the thing forbidden by the statute? In *Fowler* v. *Padget* (1) the question was whether it was an act of bankruptcy for a man to depart from his dwelling-house whereby his creditors were defeated and delayed although he had no intention of defeating and delaying them. The statute which constituted the act of bankruptcy was 1 Jac. 1, c. 15, which makes it an act of bankruptcy (amongst other things) for a man to depart his dwelling-house "to the intent *or* whereby his creditors may be defeated and delayed." The Court of King's Bench, consisting of Lord Kenyon, C.J., and Ashurst and Grose, JJ., held that there was no act of bankruptcy. "Bankruptcy," said Lord Kenyon, "is considered as a crime, and the bankrupt in the old laws is called an offender; but," he adds in the passage already cited, "it is a principle of natural justice and of our law that actus non facit reum, nisi mens sit rea," and the Court went so far as to read "and" in the statute in place of "or" which is the word used in the Act, in order to avoid the consequences which appeared to them unjust and unreasonable. In *Rex* v. *Banks* (2), above cited, Lord Kenyon referred to Foster, J 's, ruling in this case as that of "one of the best Crown lawyers that ever sat in Westminster Hall." These decisions of Foster, J., and Lord Kenyon have been repeatedly acted upon: see *Reg.* v. *Willmett* (3); *Reg.* v. *Cohen* (4); *Reg.* v. *Sleep* (in the Court for C. C. R.) (5); *Reg.* v. *O'Brien.* (6)

Now in the present instance one consequence of holding that the offence is complete if the husband or wife is de facto alive at the time of the second marriage, although the defendant had at the time of the second marriage every reason to believe the contrary, would be that though the evidence of death should be sufficient to induce the Court of Probate to grant probate of the will or

(1) 7 T. R. 509.
(2) 1 Esp. 144.
(3) 3 Cox, C. C. 281.
(4) 8 Cox, C C. 41
(5) L & C. 44; 30 L. J (M.C.) 170.
(6) 15 L. T. (N.S.) 419.

administration of the goods of the man supposed to be dead, or to prevail with the jury upon an action by the heir to recover possession of his real property, the wife of the person supposed to be dead who had married six years and eleven months after the last time that she had known him to be alive would be guilty of felony in case he should turn up twenty years afterwards. It would be scarcely less unreasonable to enact that those who had in the meantime distributed his personal estate should be guilty of larceny. It seems to me to be a case to which it would not be improper to apply the language of Lord Kenyon when dealing with a statute which literally interpreted led to what he considered an equally preposterous result, "I would adopt any construction of the statute that the words will bear in order to avoid such monstrous consequences." (1).

Again, the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of a conviction at the date of the Act of 24 & 25 Vict., to the loss of civil rights, to imprisonment with hard labour, or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally as well as unintentionally done something prohibited by law. I am well aware that the mischiefs which may result from bigamous marriages, however innocently contracted, are great: but I cannot think that the appropriate way of preventing them is to expose to the danger of a cruel injustice persons whose only error may be that of acting upon the same evidence as has appeared perfectly satisfactory to a Court of Probate, a tribunal emphatically difficult to satisfy in such matters, and certain only to act upon what appears to be the most cogent evidence of death. It is, as it seems to me, undesirable in the highest degree with-

(1) *Fowler* v. *Padget*, 7 T. R. 509, 514.

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out necessity to multiply instances in which people shall be liable to conviction upon very grave charges when the circumstances are such that no judge in the kingdom would think of pronouncing more than a nominal sentence.

It is said, however, in respect of the offence now under discussion, that the proviso in 24 & 25 Vict. c. 100, s. 57, that "nothing in the section shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for seven years last past, and shall not have been known by such person to be living within that time," points out the sole excuse of which the Act allows. I cannot see what necessity there is for drawing any such inference. It seems to me that it merely specifies one particular case, and indicates what in that case shall be sufficient to exempt the party without any further inquiry from criminal liability; and I think it is an argument of considerable weight, in this connection, that under 9 & 10 Wm. 3, c. 41, s. 2, where a similar contention was founded upon the specification of one particular circumstance under which the possession of Government stores should be justified, successive judges and Courts have refused to accede to the reasoning, and have treated it, to use the words of Lord Kenyon, as a matter that "could not bear a question" that the defendant might shew in other ways that his possession was without fraud or misbehaviour on his part: *Rex* v. *Banks*. (1)

Upon the point in question there are conflicting decisions. It was held by Martin, B., in *Reg.* v. *Turner* (2), and by Cleasby, B., in *Reg.* v. *Horton* (3), that bonâ fide belief, at the time of the second marriage, upon reasonable grounds, that the first husband or wife was dead was a defence. In *Reg.* v. *Gibbons* (4) it is said that it was held by Brett, J., after consulting Willes, J., that such a belief was no defence. The report, however, is most unsatisfactory, as, if the facts were as there stated, there was no reasonable evidence of such belief upon any reasonable grounds, and in *Reg.* v. *Prince* (5) Brett, J., gave a very elaborate judgment containing his matured and considered opinion upon a

(1) 1 Esp. 144, 147.
(2) 9 Cox, C. C. 145.
(3) 11 Cox, C. C. 670.
(4) 12 Cox, C. C. 237.
(5) Law Rep. 2 C. C. R. 154.

similar question, which it is quite impossible to reconcile with the supposed ruling in *Reg.* v. *Gibbons.* (1)

In *Reg.* v. *Bennett* (2), Bramwell, L.J., is reported to have followed *Reg.* v. *Gibbons* (1), and to have said that he had always refused to act upon *Reg.* v. *Turner.* (3) But here again the report is eminently unsatisfactory, for it proceeds to state that the prisoner was convicted of two other offences, forgery and obtaining money by false pretences, and sentenced to ten years' penal servitude, which is a greater sentence than he could have received for bigamy. Except for the purpose of bringing out the sort of man that the prisoner was, and so emphasizing the fact that he deserved condign punishment, the bigamy trial might have been omitted.

In *Reg.* v. *Moore* (4) Denman, J., after consultation with Amphlett, L.J., directed the acquittal of a woman charged with bigamy, the jury having found that although seven years had not elapsed since she last knew that her husband was living, she had when she married a second time a reasonable and bonâ fide belief that he was dead, saying that in his opinion and that of Amphlett, L.J., such belief was a defence. He added, however, that his opinion was not to be taken as a final one, and that, had the circumstances been such that the prisoner would, if the conviction could be sustained, have deserved a substantial sentence, he should have directed a conviction, and reserved the question.

There is nothing, therefore, in the state of the authorities directly bearing upon the question to prevent one from deciding it upon the grounds of principle. It is suggested, however, that the important decision of the Court of fifteen judges in *Reg.* v. *Prince* (5), is an authority in favour of a conviction in this case. I do not think so. In *Reg.* v. *Prince* (5) the prisoner was indicted under 24 & 25 Vict. c. 100, s. 55, for "unlawfully taking an unmarried girl, then being under the age of sixteen years, out of the possession and against the will of her father." The jury found that the prisoner bonâ fide believed upon reasonable

(1) 12 Cox, C. C. 237.
(2) 14 Cox, C. C. 45.
(3) 9 Cox, C. C. 145.
(4) 13 Cox, C. C. 544.
(5) Law Rep. 2 C. C. R. 154.

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grounds that she was eighteen. The Court (dissentiente Brett, J.) upheld the conviction. Two judgments were delivered by a majority of the Court in each of which several judges concurred, whilst three of them, Denman, J., Pollock, B., and Quain, J., concurred in both. The first of the two, being the judgment of nine judges, upheld the conviction upon the ground that, looking to the subject-matter of the enactment, to the group of sections amongst which it is found, and to the history of legislation on the subject, the intention of the legislature was that if a man took an unmarried girl under sixteen out of the possession of her father against his will, he must take his chance of whether any belief he might have about her age was right or wrong, and if he made a mistake upon this point so much the worse for him; he must bear the consequences. The second of the two judgments, being that of seven judges, gives a number of other reasons for arriving at the same conclusion, some of them founded upon the policy of the legislature as illustrated by other associated sections of the same Act. This judgment contains an emphatic recognition of the doctrine of the "guilty mind," as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be eighteen and not sixteen, even then, in taking her out of the possession of the father against his will was doing an act wrong in itself. "This opinion," says the judgment, "gives full scope to the doctrine of the mens rea." (1)

The case of *Reg.* v. *Prince* (2), therefore, is a direct and cogent authority for saying that the intention of the legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, whilst, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind, preponderate greatly over any that point to its exclusion.

In my opinion, therefore, this conviction ought to be quashed. My brother Charles authorizes me to say that this judgment expresses his views as well as my own.

(1) Law Rep. 2 C. C. R. 175. (2) Law Rep. 2 C. C. R. 154.

CAVE, J. In this case the prisoner was convicted of bigamy. She was married on September 11, 1880, and was deserted by her husband on December 13, 1881. From inquiries which she and her father made about him from his brother, she was led to believe that he had been lost in a vessel bound for America, which went down with all hands. In January, 1887, she married again, supposing herself to be a widow. Her first husband returned from America in December, 1887. The jury found that the prisoner in good faith, and on reasonable grounds, believed her husband to be dead at the time of her second marriage.

At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim "actus non facit reum, nisi mens sit rea." Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common law doctrine will readily occur to the mind. So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication. In *Reg.* v. *Prince* (1), in which the principle of mistake underwent much discussion, it was not suggested by any of the judges that the exception of honest and reasonable mistake was not applicable to all offences, whether existing at common law or created by statute. As I understand the judgments in that case the difference of opinion was as to the exact extent of the exception, Brett, J., the dissenting judge, holding that it applied wherever the accused honestly and reasonably believed in the existence of circumstances which, if true, would have made his act not criminal, while the majority of the judges seem to have held that in order to make the defence available in that case the accused must have proved the existence in his mind of an honest and reasonable belief in the existence of circumstances which, if they had really existed, would have made his act not only not criminal but also not immoral. Whether the majority held that the

(1) Law Rep. 2 C. C. R. 154.

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general exception is limited to cases where there is an honest belief not only in facts which would make the act not criminal, but also in facts which would make it not immoral, or whether they held that the general doctrine was correctly stated by Brett, J., and that the further limitation was to be inferred from the language of the particular statute they were then discussing, is not very clear. It is, however, immaterial in this case, as the jury have found that the accused honestly and reasonably believed in the existence of a state of circumstances, viz., in her first husband's death, which, had it really existed, would have rendered her act not only not criminal, but also not immoral.

It is argued, however, that, assuming the general exception to be as stated, yet the language of the Act (24 & 25 Vict. c. 100, s. 57), is such that that exception is necessarily excluded in this case. Now it is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right; just as the legislature may enact that a child or a lunatic shall be punished criminally for an act which he has been led to commit by the immaturity or perversion of his reasoning faculty. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act. It is said that this inference necessarily arises from the language of the section in question, and particularly of the proviso. The section (omitting immaterial parts) is in these words: "Whosoever being married shall marry any other person during the life of the former husband or wife shall be guilty of felony: provided that nothing in this section contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by such person to be living within that time." It is argued that the first part is expressed absolutely; but, surely, it is not contended that the language admits of no exception, and therefore that a lunatic who, under the influence of a delusion, marries again, must be convicted; and, if an exception is to be admitted where the reasoning faculty is perverted by disease,

why is not an exception equally to be admitted where the reasoning faculty, although honestly and reasonably exercised, is deceived? But it is said that the proviso is inconsistent with the exception contended for; and, undoubtedly, if the proviso covers less ground or only the same ground as the exception, it follows that the legislature has expressed an intention that the exception shall not operate until after seven years from the disappearance of the first husband. But if, on the other hand, the proviso covers more ground than the general exception, surely it is no argument to say that the legislature must have intended that the more limited defence shall not operate within the seven years because it has provided that a less limited defence shall only come into operation at the expiration of those years.

What must the accused prove to bring herself within the general exception? She must prove facts from which the jury may reasonably infer that she honestly and on reasonable grounds believed her first husband to be dead before she married again. What must she prove to bring herself within the proviso? Simply that her husband has been continually absent for seven years; and, if she can do that, it will be no answer to prove that she had no reasonable grounds for believing him to be dead or that she did not honestly believe it. Unless the prosecution can prove that she knew her husband to be living within the seven years she must be acquitted. The honesty or reasonableness of her belief is no longer in issue. Even if it could be proved that she believed him to be alive all the time, as distinct from knowing him to be so, the prosecution must fail. The proviso, therefore, is far wider than the general exception; and the intention of the legislature, that a wider and more easily established defence should be open after seven years from the disappearance of the husband, is not necessarily inconsistent with the intention that a different defence, less extensive and more difficult of proof, should be open within the seven years.

Some difficulty in seeing that the proviso is wider than the general exception has arisen from the establishment of the presumption of a man's death after he has not been heard of for seven years and from the increased facilities for transmitting intelligence which are due to modern science. If we turn to the

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1 Jac. 1, c. 11, the first statute which made bigamy an offence punishable by the Courts of Common Law, we find an enactment substantially the same as that now in force, "If any person being married do marry any person, the former husband or wife being alive, every such offence shall be felony, and the person offending shall suffer death: provided always that this Act, nor anything therein contained, shall extend to any person whose husband or wife shall absent him or herself the one from the other by the space of seven years together in any parts within his Majesty's dominion, the one of them not knowing the other to be living within that time." When this Act was passed the presumption of a man's death after he had not been heard of for seven years had not been established. In *Doe* d. *Knight* v. *Nepean* (1) it is expressly stated by Lord Denman, C.J., that that period was adopted as the ground for such presumption in analogy to the statutes 1 Jac. 1, c. 11, relating to bigamy, and 19 Car. 2, c. 6, as to the continuance of lives on which leases were held. In the absence of such presumption it would have been difficult at that time for the accused to prove, even when her husband had been away seven years, that she had reasonable grounds for believing him to be dead; while, on the other hand, if she had succeeded in satisfying judge and jury that she honestly so believed on reasonable grounds and had married in such belief after he had gone away six years only, if the contention on behalf of the Crown is right, the jury must have convicted her, and the judge must have sentenced her to death, for doing what they were satisfied she honestly and reasonably believed she had a perfect right to do. For these reasons I am of opinion that the conviction cannot be supported.

In this judgment my brothers Day and A. L. Smith concur.

STEPHEN, J. The cases were both reserved by me, *Reg.* v. *Tolson*, on a trial which both took place at Carlisle on the summer circuit of 1888, and *Reg.* v. *Strype*, on a trial which took place in December last at Winchester in the autumn circuit of 1888 (2). In each case precisely the same point arose. In each

(1) 5 B. & Ad. 86, at p. 94.

(2) It is unnecessary in this report to further allude to the case of *Reg.* v. *Strype*, the decision in which followed that in the present case.

the prisoner, a woman, was indicted for bigamy. In each case the prisoner lost sight of her husband who deserted her, and in each case she was informed that he was dead and believed the information, as the jury expressly found, in good faith and on reasonable grounds. In each case the second ceremony of marriage was performed within the term of seven years after the husband and wife separated.

For the purpose of settling a question which had been debated for a considerable time, and on which I thought the decisions were conflicting, and not as the expression of my own opinion, I directed the jury that a belief in good faith and on reasonable grounds in the death of one party to a marriage was not a defence to the charge of bigamy against the other who married again within the seven years. In each case I passed a nominal sentence on the person convicted, and I stated, for the decision of this Court, cases which reserved the question whether my decision was right or wrong. I am of opinion that each conviction should be quashed, as the direction I gave was wrong, and that I ought to have told the jury that the defence raised for each prisoner was valid. My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase "non est reus, nisi mens sit rea." Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a "mens rea," or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. "Mens rea" means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a "mens

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rea," or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, in other words, that immorality is essential to crime. It will, I think, be found that much of the discussion of the law of libel in *Shipley's Case* (1) proceeds upon a more or less distinct belief to this effect. It is a topic frequently insisted upon in reference to political offences, and it was urged in a recent notorious case of abduction, in which it was contended that motives said to be laudable were an excuse for the abduction of a child from its parents.

Like most legal Latin maxims, the maxim on mens rea appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in doing so. It is not one of the "regulae juris" in the Digest. The earliest case of its use which I have found is in the "Leges Henrici Primi," v. 28, in which it is said: "Si quis per coaccionem abjurare cogatur quod per multos annos quiete tenuerit, non in jurante set cogente perjurium erit. Reum non facit nisi mens rea." In Broom's Maxims the earliest authority cited for its use is 3rd Institute, ch. i., fo. 10. In this place it is contained in a marginal note, which says that when it was found that some of Sir John Oldcastle's adherents took part in an insurrection "pro timore mortis et quod recesserunt quam cito potuerunt," the judges held that this was to be adjudged no treason, because it was for fear of death. Coke adds: "Et actus non facit reum, nisi mens sit rea." This is only Coke's own remark, and not part of the judgment. Now Coke's scraps of Latin in this and the following chapters are sometimes contradictory. Nothwithstanding the passage just quoted, he says in the margin of his remarks on opinions delivered in Parliament by Thyrning and others in the 21st R. 2: "Melius est omnia mala patī quam malo consentire" (22–3) which would shew that Sir J. Oldcastle's associates had a mens rea, or guilty mind, though they were threatened with death, and thus contradicts the passage first quoted.

(1) 4 Doug. 73; 21 St. Tr. 847.

It is singular that in each of these instances the maxim should be used in connection with the law relating to coercion.

The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime if fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words "maliciously," "fraudulently," "negligently," or "knowingly," but it is the general—I might, I think, say, the invariable—practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.

The meanings of the words "malice," "negligence," and "fraud" in relation to particular crimes has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence.

With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, can any one doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring ones. *Levet's Case* (1) decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar

(1) 1 Hale, 474.

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to be, killed a person who was not a burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing per infortunium, or possibly, se defendendo, which then involved certain forfeitures. In other words, he was in the same situation as far as regarded the homicide as if he had killed a burglar. In the decision of the judges in *Macnaghten's Case* (1) it is stated that if under an insane delusion one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A bonâ fide claim of right excuses larceny, and many of the offences against the Malicious Mischief Act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.

I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. A very learned person suggested to me the following case: a constable, reasonably believing a man to have committed murder, is justified in killing him to prevent his escape, but if he had not been a constable he would not have been so justified, but would have been guilty of manslaughter. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law on the part of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter. I think, therefore, that the cases reserved fall under the general rule as to mistakes of fact, and that the convictions ought to be quashed.

I will now proceed to deal with the arguments which are supposed to lead to the opposite result.

It is said, first, that the words of 24 & 25 Vict. c. 100, s. 57, are absolute, and that the exceptions which that section contains are

(1) 10 C. & F. 200.

the only ones which are intended to be admitted, and this it is said is confirmed by the express proviso in the section—an indication which is thought to negative any tacit exception. It is also supposed that the case of *Reg.* v. *Prince* (1), decided on s. 55, confirms this view. I will begin by saying how far I agree with these views. First, I agree that the case turns exclusively upon the construction of s. 57 of 24 & 25 Vict. c. 100. Much was said to us in argument on the old statute, 1 Jac. 1, c. 11. I cannot see what this has to do with the matter. Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.

In the first place I will observe upon the absolute character of the section. It appears to me to resemble most of the enactments contained in the Consolidation Acts of 1861, in passing over the general mental elements of crime which are presupposed in every case. Age, sanity, and more or less freedom from compulsion, are always presumed, and I think it would be impossible to quote any statute which in any case specifies these elements of criminality in the definition of any crime. It will be found that either by using the words wilfully and maliciously, or by specifying some special intent as an element of particular crimes, knowledge of fact is implicitly made part of the statutory definition of most modern definitions of crimes, but there are some cases in which this cannot be said. Such are s. 55, on which *Reg.* v. *Prince* (1) was decided, s. 56, which punishes the stealing of "any child under the age of fourteen years," s. 49, as to procuring the defilement of any "woman or girl under the age of twenty-one," in each of which the same question might arise as in *Reg.* v. *Prince* (1); to these I may add some of the provisions of the Criminal Law Amendment Act of 1885. Reasonable belief that a girl is sixteen or upwards is a defence to the charge of an offence under ss. 5, 6 and 7, but this is not provided for as to an offence against s. 4, which is meant to protect girls under thirteen.

It seems to me that as to the construction of all these sections the case of *Reg.* v. *Prince* (1) is a direct authority. It was the case

(1) Law Rep. 2 C. C. R. 154.

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of a man who abducted a girl under sixteen, believing, on good grounds, that she was above that age. Lord Esher, then Brett, J., was against the conviction. His judgment establishes at much length, and, as it appears to me, unanswerably, the principle above explained, which he states as follows: "That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England."

Lord Blackburn, with whom nine other judges agreed, and Lord Bramwell, with whom seven others agreed, do not appear to me to have dissented from this principle, speaking generally; but they held that it did not apply fully to each part of every section to which I have referred. Some of the prohibited acts they thought the legislature intended to be done at the peril of the person who did them, but not all.

The judgment delivered by Lord Blackburn proceeds upon the principle that the intention of the legislature in s. 55 was "to punish the abduction unless the girl was of such an age as to make her consent an excuse."

Lord Bramwell's judgment proceeds upon this principle: "The legislature has enacted that if any one does this wrong act he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the mens rea. If the taker believed he had her father's consent, though wrongly, he would have no mens rea; so if he did not know she was in any one's possession nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute."

All the judges therefore in *Reg.* v. *Prince* (1) agreed on the general principle, though they all, except Lord Esher, considered that the object of the legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not) it was to be supposed that they intended that the wrongdoer should act at his peril.

As another illustration of the same principle, I may refer

(1) Law Rep. 2 C. C. R. 154.

to *Reg.* v. *Bishop.* (1) The defendant in that case was tried before me for receiving more than two lunatics into a house not duly licensed, upon an indictment on 8 & 9 Vict. c. 100, s. 44. It was proved that the defendant did receive more than two persons, whom the jury found to be lunatics, into her house, believing honestly, and on reasonable grounds, that they were not lunatics. I held that this was immaterial, having regard to the scope of the Act, and the object for which it was apparently passed, and this Court upheld that ruling.

The application of this to the present case appears to me to be as follows. The general principle is clearly in favour of the prisoners, but how does the intention of the legislature appear to have been against them? It could not be the object of parliament to treat the marriage of widows as an act to be if possible prevented as presumably immoral. The conduct of the women convicted was not in the smallest degree immoral, it was perfectly natural and legitimate. Assuming the facts to be as they supposed, the infliction of more than a nominal punishment on them would have been a scandal. Why, then, should the legislature be held to have wished to subject them to punishment at all.

If such a punishment is legal, the following amongst many other cases might occur. A number of men in a mine are killed, and their bodies are disfigured and mutilated, by an explosion; one of the survivors secretly absconds, and it is supposed that one of the disfigured bodies is his. His wife sees his supposed remains buried; she marries again. I cannot believe that it can have been the intention of the legislature to make such a woman a criminal; the contracting of an invalid marriage is quite misfortune enough. It appears to me that every argument which shewed in the opinion of the judges in *Reg.* v. *Prince* (2) that the legislature meant seducers and abductors to act at their peril, shews that the legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties, to be a valid and honourable marriage, with a liability to seven years' penal servitude.

It is argued that the proviso that a re-marriage after seven years' separation shall not be punishable, operates as a tacit

(1) 5 Q. B. D. 259. (2) Law Rep. 2 C. C. R. 154.

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exclusion of all other exceptions to the penal part of the section. It appears to me that it only supplies a rule of evidence which is useful in many cases, in the absence of explicit proof of death. But it seems to me to shew not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death caused by other evidence would have at any time. It would to my mind be monstrous to say that seven years' separation should have a greater effect in excusing a bigamous marriage than positive evidence of death, sufficient for the purpose of recovering a policy of assurance or obtaining probate of a will, would have, as in the case I have put, or in others which might be even stronger. It remains only to consider cases upon this point decided by single judges. As far as I know there are reported the following cases:—

Reg. v. *Turner* (1862). (1) In this case Martin, B., is reported to have said: "In this case seven years had not elapsed, and beyond the prisoner's own statement there was the mere belief of one witness. Still the jury are to say if upon such testimony she had an honest belief that her first husband was dead."

In *Reg.* v. *Horton* (1871) (2) Cleasby, B., directed the jury that if the prisoner reasonably believed his wife to be dead he was entitled to be acquitted. He was convicted.

In *Reg.* v. *Gibbons* (1872) (3), Brett, J., after consulting Willes, J., said: "Bonâ fide belief as to the husband's death was no defence unless the seven years had elapsed," and he refused to reserve a case, a decision which I cannot reconcile with his judgment three years afterwards in *Reg.* v. *Prince.* (4) In *Reg.* v. *Moore* (1877) (5) Denman, J., after consulting Amphlett, L.J., held that a bonâ fide and reasonable belief in a husband's death excused a woman charged with bigamy. In *Reg.* v. *Bennett* (1877) (6) Lord Bramwell agreed with the decision in *Reg.* v. *Gibbons.* (3)

The result is that the decisions in *Reg.* v. *Gibbons* (3) and *Reg.* v. *Bennett* (6) conflict with those of *Reg.* v. *Turner* (1); *Reg.* v. *Horton* (2) and *Reg.* v. *Moore.* (5) I think, therefore, that these

(1) 9 Cox, C. C. 145.
(2) 11 Cox, C. C. 670.
(3) 12 Cox, C. C. 237.
(4) Law Rep. 2 C. C. R. 154.
(5) 13 Cox, C. C. 544.
(6) 14 Cox, C. C. 45.

five decisions throw little light on the subject. The conflict between them was in fact the reason why I reserved the cases.

My brother Grantham authorizes me to say that he concurs in this judgment.

HAWKINS, J. The statute 24 & 25 Vict. c. 100, s. 57, enacts that "whosoever, being married, shall marry any other person during the lifetime of the former husband or wife shall be guilty of felony."

Undoubtedly the defendant, being married, did marry another person during the life of her former husband. But she did so believing in good faith and upon reasonable grounds that her first husband was dead; and the sole question now raised is whether such belief afforded her a valid legal defence against the indictment for bigamy upon which she was tried.

I am clearly of opinion that it did and that she ought to have been acquitted.

The ground upon which I have arrived at this conclusion is simply this; that, having contracted her second marriage under an honest and reasonable belief in the existence of a state of things which, if true, would have afforded her a complete justification, both legally and morally, there was an absence of that mens rea which is an essential element in every charge of felony.

In Hawkins, P.C., book 1, c. 25, s. 3, Of Felony, it is said: "It is always accompanied with an evil intention, and therefore shall not be imputed to a mere mistake or misanimadversion." In Hale's P.C., vol. 2, p. 184, it is said "an indictment of felony must always allege the fact to be done felonice." To the same effect is the language of Hawkins, P.C., book 2, c. 25, s. 55, and many cases are to be found in the books which put it beyond doubt that an indictment for felony is bad if it omits to aver the act charged to have been done "feloniously," and this whether the felony be one at common law or created by statute: *Reg.* v. *Gray.* (1) As to the meaning of the term "feloniously" I do not think I can better define my understanding of it when introduced into an indictment as descriptive of the act charged than by saying that I look upon it as meaning that such act was done

(1) L. & C. 365.

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with a mind bent on doing that which is wrong, or, as it has been sometimes said, with a guilty mind. As to this I may refer to Hawkins, P.C., book 1, c. 25, s. 1, where it is said that the term "felony" ex vi termini signifies "quodlibet crimen felleo animo perpetratum."

In support of this view a whole list of authorities might be quoted. I shall, however, content myself by citing the most recent of them, viz. *Reg.* v. *Prince* (1), in which most of the cases bearing on the subject are very carefully reviewed by the present Master of the Rolls, then Brett, J., whose language I cheerfully adopt as expressive of my own views touching the principles of law which govern such questions as that now before us. He says (2): "It would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind, or mens rea, in every offence really charged as a crime;" "in some cases the proof of the committal of the acts may primâ facie, either by reason of their own nature, or by reason of the form of the statute, import the proof of the mens rea. But even in those cases it is open to the prisoner to rebut the primâ facie evidence, so that if in the end, the jury are satisfied that there was no criminal mind, or mens rea, there cannot be a conviction in England for that which is by the law considered to be a crime." In this view of the law, so stated by Brett, J., all the other judges, fifteen in number, before whom the matter was heard, practically acquiesced. They differed, however, in the application of the law to the facts of the particular case, Brett, J., thinking that there was in the prisoner no such mens rea as was necessary to constitute a crime; the rest of the Court thinking that the act of abduction of which the prisoner was guilty, being a morally wrong act, afforded abundant proof of his criminal mind.

It has, however, been suggested that the intention of the legislature to make a second marriage during the life of the former husband or wife a crime, whatever may have been the circumstances attending it, unless the case is brought within the proviso which follows in the same section, is proved by the introduction of that proviso, which runs as follows: "Provided that nothing in this section contained shall extend to any person

(1) Law Rep. 2 C. C. R. 154. (2) At p. 162.

marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by such person to be living within that time." I cannot take that view of the proviso. It seems to me to be far more reasonable to look upon that portion of the section as intended simply and absolutely to exempt from the operation of it any person who should not have had actual knowledge of his or her former wife or husband being alive within seven years before the second marriage, and not to deprive a person indicted for bigamy of any defence which would have been open to him or her had the proviso never been introduced at all. I cannot for a moment suppose that the legislature ever contemplated that a woman who within seven years from the day she last knew her husband to be living, bonâ fide trusting and relying upon a body of evidence overwhelmingly sufficient to satisfy the best of judges and juries that he was dead, and honestly believing upon such evidence that he was so, married again, feeling that in so doing she was doing a perfectly legal and moral act, should nevertheless be liable to be indicted for the felony of bigamy, and convicted and condemned to a long term of penal servitude, upon mere proof that, though honestly and reasonably believed by her to be dead, her former husband was in fact alive. A thousand illustrations to demonstrate the cruelty and injustice of such a state of the law might be suggested, but I cannot think that even one is necessary. If the views of those who support this conviction could be upheld, no person could with absolute certainty of immunity marry a second time until seven years had elapsed after the supposed death of a former husband or wife, no matter how strong and cogent the proof of such death might be.

I do not think it will assist in the solution of the question to refer to the conflicting opinions of single judges upon the point, beyond calling attention to the fact that the case of *Reg.* v. *Gibbons* (1), in which Brett, J. (after consulting Willes, J.), ruled that such circumstances as are relied on in the present case afforded no defence, occurred in the year 1872, whereas the case of *Reg.* v. *Prince* (2), in which the same learned judge delivered

(1) 12 Cox, C. C. 237. (2) Law Rep. 2 C. C. R. 154.

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the judgment to which I have referred, was not decided till three years later. After the latter judgment I doubt if that learned judge would have adhered to the opinion expressed by him in the year 1872.

I am, for the reasons above expressed, of opinion that the conviction ought to be reversed.

MANISTY, J. I am of opinion that the conviction should be affirmed.

The question is whether if a married woman marries another man during the life of her former husband and within seven years of his leaving her she is guilty of felony, the jury having found as a fact that she had reason to believe and did honestly believe that her former husband was dead.

The 57th section of the 24 & 25 Vict. c. 100, is as express and as free from ambiguity as words can make it. The statute says, "Whosoever being married shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony, and being convicted, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour." The statute does not even say if the accused shall feloniously or unlawfully or knowingly commit the act he or she shall be guilty of felony, but the enactment is couched in the clearest language that could be used to prohibit the act and to make it a felony if the act is committed.

If any doubt could be entertained on the point it seems to me the proviso which follows the enactment ought to remove it. The proviso is that "nothing in the 57th section of the Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by such person to be living within that time."

Such being the plain language of the Act, it is, in my opinion, the imperative duty of the Court to give effect to it, and to leave it to the legislature to alter the law if it thinks it ought to be altered.

Probably if the law was altered some provision would be made in favour of children of the second marriage. If the second marriage is to be deemed to be legal for one purpose, surely it ought to be deemed legal as to the children who are the offspring of it. If it be within the province of the Court to consider the reasons which induced the legislature to pass the Act as it is, it seems to me one principal reason is on the surface, namely, the consequence of a married person marrying again in the lifetime of his or her former wife or husband, in which case it might and in many cases would be that several children of the second marriage would be born and all would be bastards. The proviso is evidently founded upon the assumption that after the lapse of seven years and the former husband or wife not being heard of, it may reasonably be inferred that he or she is dead, and thus the mischief of a second marriage in the lifetime of the former husband or wife is to a great extent, if not altogether, avoided.

It is to be borne in mind that bigamy never was a crime at common law. It has been the subject of several Acts of Parliament, and is now governed by 24 & 25 Vict. c. 100, s. 57.

No doubt in construing a statute the intention of the legislature is what the Court has to ascertain, but the intention must be collected from the language used, and where that language is plain and explicit and free from all ambiguity, as it is in the present case, I have always understood that it is the imperative duty of judges to give effect to it.

The cases of insanity, &c., on which reliance is placed stand on a totally different principle, viz., that of an absence of mens. Ignorance of the law is no excuse for the violation of it, and if a person choose to run the risk of committing a felony, he or she must take the consequences if it turn out that a felony has been committed.

Great stress is laid by those who hold that the conviction should be quashed upon the circumstance that the crime of bigamy is by the statute declared to be a felony and punishable with penal servitude or imprisonment with or without hard labour for any term not exceeding two years. If the crime had been declared to be a misdemeanour punishable with fine or imprisonment, surely the construction of the statute would have

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been, or ought to have been, the same. It may well be that the legislature declared it to be a felony to deter married persons from running the risk of committing the crime of bigamy, and in order that a severe punishment might be inflicted in cases where there were no mitigating circumstances. No doubt circumstances may and do affect the sentence, even to the extent of the punishment being nominal, as it was in the present case, but that is a very different thing from disregarding and contravening the plain words of the Act of Parliament.

The case is put by some of my learned Brothers of a married man leaving his wife and going into a foreign country intending to settle there, and it may be afterwards to send for his wife and children, and the ship in which he goes is lost in a storm with, as is supposed, all on board, and after the lapse of say a year, and no tidings received of any one having been saved, the underwriters pay the insurance on the ship, and the supposed widow gets probate of her husband's will and marries and has children, and after the lapse of several years the husband appears, it may be a few days before seven years have expired, and the question is asked, would it not be shocking that in such a case the wife could be found guilty of bigamy?

My answer is that the Act of Parliament says in clear and express words, for very good reasons as I have already pointed out, that she is guilty of bigamy. The only shocking fact would be that someone for some purpose of his own had instituted the prosecution. I need not say that no public prosecutor would ever think of doing so, and the judge before whom the case came on for trial would, as my brother Stephen did in the present case, pass a nominal sentence of a day's imprisonment (which in effect is immediate discharge) accompanied, if I were the judge, with a disallowance of the costs of the prosecution. It may be said, but the woman is put to some trouble and expense in appearing before the magistrate, who would of course take nominal bail, and in appearing to take her trial. Be it so, but such a case would be very rare indeed. On the other hand, see what a door would be opened to collusion and mischief if, in the vast number of cases where men in humble life leave their wives and go abroad, it would be a good defence for a woman to say and

give proof, which the jury believed, that she had been informed by some person upon whom she honestly thought she had reason to rely, and did believe, that her husband was dead, whereas in fact she had been imposed upon and her husband was alive.

What operates strongly on my mind is this, that if the legislature intended to prohibit a second marriage in the lifetime of a former husband or wife, and to make it a crime, subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in the 57th section of the Act in question. In this view I am fortified by several sections of the same Act, where the words "unlawfully" and "maliciously and unlawfully" are used (as in s. 23), and by a comparison of them with the section in question (s. 57), where no such words are to be found. I especially rely upon the 55th section by which it is enacted that "whosoever shall unlawfully" (a word not used in s. 57) take or cause to be taken any unmarried girl being under the age of sixteen years out of the possession of her father or mother or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour." Fifteen out of sixteen judges held in the case of *Reg.* v. *Prince* (1) that, notwithstanding the use of the word "unlawfully" the fact of the prisoner believing and having reason to believe that the girl was over sixteen afforded no defence. This decision is approved of upon the present occasion by five judges, making in all twenty against the nine who are in favour of quashing the conviction. To the twenty I may, I think, fairly add Tindal, C.J., in *Reg.* v. *Robins* (2) and Willes, J., in *Reg.* v. *Mycock.* (3).

I rely also very much upon the 5th section of the Act passed in 1885 for the better protection of women and girls (48 & 49 Vict. c. 69), by which it was enacted that "any person who unlawfully and carnally knows any girl above thirteen and under sixteen years shall be guilty of a misdemeanour," but to that is added a proviso that "it shall be a sufficient defence if it be made to appear to the Court or jury before whom the charge shall be brought that the person charged had reasonable cause to

(1) Law Rep. 2 C. C. R. 154. (2) 1 C. & K. 456.
(3) 12 Cox, C. C. 28.

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believe and did believe that the girl was of or above the age of sixteen." It is to be observed that notwithstanding the word "unlawfully" appears in this section it was considered necessary to add the proviso, without which it would have been no defence that the accused had reasonable cause to believe and did believe that the girl was of or above the age of sixteen. Those who hold that the conviction in the present case should be quashed really import into the 57th section of the 24 & 25 Vict. c. 100, the proviso which is in the 5th section of the 48 & 49 Vict. c. 69, contrary, as it seems to me, to the decision in *Reg.* v. *Prince* (1), and to the hitherto undisputed canons for construing a statute.

It is said that an indictment for the offence of bigamy commences by stating that the accused feloniously married, &c., and consequently the principle of mens rea is applicable. To this I answer that it is to the language of the Act of Parliament and not to that of the indictment the Court has to look. I consider the indictment would be perfectly good if it stated that the accused, being married, married again in the lifetime of his or her wife or husband contrary to the statute, and so was guilty of felony.

I am very sorry we had not the advantage of having the case argued by counsel on behalf of the Crown. My reason for abstaining from commenting upon the cases cited by Mr. Henry in his very able argument for the prisoner is because the difference of opinion among some of the judges in those cases is as nothing compared with the solemn decision of fifteen out of sixteen judges in the case of *Reg.* v. *Prince.* (1) So far as I am aware, in none of the cases cited by my learned Brothers was the interest of third parties, such as the fact of there being children of the second marriage, involved. I have listened with attention to the judgments which have been delivered, and I have not heard a single observation with reference to this, to my mind, important and essential point. I am absolutely unable to distinguish *Reg.* v. *Prince* (1) from the present case, and, looking to the names of the eminent judges who constituted the majority, and to the reasons given in their judgments, I am of opinion upon authority as well as principle that the conviction should be affirmed.

(1) Law Rep. 2 C. C. R. 154.

The only observation which I wish to make is (speaking for myself only), that I agree with my learned brother Stephen in thinking that the phrases "mens rea" and "non est reus nisi mens sit rea" are not of much practical value, and are not only "likely to mislead," but are "absolutely misleading." Whether they have had that effect in the present case on the one side or the other it is not for me to say.

I think the conviction should be affirmed. My brothers Denman, Pollock, Field, and Huddleston agree with this judgment, but my brother Denman has written a short opinion of his own, with which my brother Field agrees. This opinion is as follows:

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DENMAN, J. "Having done my best to form a correct judgment as to the real intention of the statute on which the question turns, I have come to the conclusion, notwithstanding the reasons which have been given to the contrary, that it was intended to provide, and does provide, that any person who marries another (his or her wife or husband as the case may be being at the time alive) does so at his or her peril; and can only make good a defence to a prosecution for bigamy by proving a continuous absence for seven years: and that even such an absence will not be a defence if the prosecution can prove knowledge on the part of the accused within seven years of the second marriage that the first wife or husband, as the case may be, was still alive. I am desired by my brother Field to add that he agrees in this view, but that he also agrees with me that it is not necessary to give any detailed reasons for dissenting from the judgment of the majority."

LORD COLERIDGE, C.J. At the conclusion of the arguments in this case I was one of those who also dissented from the conclusion of the majority, and if the statute had not contained the proviso which it does contain, I should not have at that time dissented from those conclusions. The reason for my dissent at that time was—as has been very well put by the judges who differ from the conclusion at which I have now arrived—that the enactment of the statute being positive, and in the very same section

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a proviso limiting the positiveness of that construction being found, the whole section must be taken together, and the section must be read as if it lay upon the prosecution to shew that in the particular case the proviso did not apply. If that were so, I should have maintained my opinion, and I am very far indeed from saying that there is no considerable ground and reason for maintaining that view. But I have had the great advantage of reading the opinion which my brother Cave has written in this case, and I found myself unable to answer satisfactorily to my own mind the view which he put forward as to the positive enactment of the statute, and the effect upon that positive enactment of the proviso to which I have referred. If there had been no proviso I confess I should have thought that this statute was to be read like any other statute, and that it was to be shewn, or evidence was to be given, of the felonious intention with which the act in question was performed. That might be an inference to be drawn from the mere fact of the marriage being contracted, but it might also well be an inference that might be rebutted, as it might in any other case, by the distinct and absolute proof that the intention to violate the statute—I do not mean the intention to do the particular act and the intention to violate any particular statute, but what has been defined, and for all purposes sufficiently defined, as the mens rea—existed in the person who was indicted. If that had been so, I should have thought at the beginning that the majority were right. I did not think so for the reason that I have given. I am unable to answer the view of the proviso which has been put forward by my brother Cave, and I have, therefore, perhaps with some reluctance, come to the conclusion that the reasoning of the judgments of the majority is in this case correct.

I would only add, as I think it desirable to add, that, as far as I understand, none of the learned judges in this case intend to differ from the solemn judgment in *Reg.* v. *Prince.* (1) I certainly have no intention of differing from those judgments. An attempt has been made, apparently not satisfactory to my brother Manisty, to distinguish this case from *Reg.* v. *Prince* (1); but it would be unbecoming in a single judge, and unbecoming in

(1) Law Rep 2 C. C. R. 154

any judge, to presume to overrule the decision arrived at by so powerful a Court, by a single—no doubt very able—dissenting judge. I accept it, in my view of it, as fully as my learned Brother, and I believe that all my learned Brethren would concur with me in saying that though they may perhaps be wrong in taking the view of that decision that they do take (nobody can be infallible) they intend to accept the decision of the majority of the judges in *Reg.* v. *Prince.* (1)

I am, therefore, of opinion on the whole that this conviction should be quashed.

Conviction quashed.

Solicitor for prisoner: *Atter, Whitehaven.*

H. D. W.
W. J. B.

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May 18

Criminal Law—Cruelty to Animals—Dishorning Cattle—Infliction of Unnecessary Pain—12 & 13 *Vict. c.* 92, *s.* 2.

By 12 & 13 Vict. c. 92, s. 2, "if any person shall cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal," every such offender shall be liable to a penalty.

At the hearing of an information under s. 2 against the respondent, a farmer in Norfolk, for ill-treating, abusing and torturing a number of oxen, it appeared that he had caused their horns to be sawn off, and evidence was given by scientific witnesses that this operation caused extreme and prolonged pain, and was cruel, and absolutely unnecessary; that dishorning was not practised in other counties of England, and had been long discontinued in Norfolk, and only revived within four years in one part of that county; and that goring was prevented by "tipping" the horns, or by removing the core before the animal was six months old, which caused only trifling pain. For the defence, evidence was given by farmers that dishorning changed the character of the animals, rendered them quiet, prevented them from goring and ill-treating others, made them graze better and fatten more quickly, enabled a greater number of them to be stowed in a yard or railway truck, and slightly increased the value of each animal, and that "tipping" the horns was of no benefit.

The justices were of opinion that the dishorning had caused considerable pain and suffering to the animals, that the respondent had exercised ordinary care in the operation, that the practice had been carried on in a part of the county of Norfolk to a considerable extent during the past three or four years, that the results attained by dishorning would not be attained by merely

(1) Law Rep. 2 C. C. R. 154.

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tipping the horns, that the respondent had not any cruel intention, but acted under the honest belief that the operation was for the benefit of the animals themselves, and as well for the benefit of himself as a grazier, and that the object he had in view could not be attained by any known method; they accordingly dismissed the information.

Held, that the operation of dishorning caused extreme pain without adequate and reasonable object, and was unnecessary abuse of the animal and, therefore, unjustifiable, and that the respondent ought to have been convicted.

CASE stated by justices of Norfolk. On November 26, 1888, the appellant prosecuted the respondent before the justices under 12 & 13 Vict. c. 92, s. 2, in two separate informations, for that he, the respondent, did ill-treat, abuse, and torture, and cause to be ill-treated, abused, and tortured, sixteen oxen on the 8th, and sixteen other oxen on the 15th day of October, 1888.

On behalf of the respondent it was admitted that he had caused to be performed the operation of dishorning upon the animals on the days named, and in the manner by which dishorning is usually performed.

The evidence given was set out at length in the case:—

The appellant and thirteen veterinary surgeons of experience—presidents, professors, fellows, and members of veterinary colleges—in different parts of England and Scotland were called as witnesses for the prosecution.

The material part of their evidence is stated in the judgment of the Lord Chief Justice, and may be thus summarized:—

The cattle dishorned were two years old. Their horns had been sawn off by the respondent's men with a common saw as close to the head as a flat saw could do it. The respondent had described the process to the appellant, and said that the animals generally bled for five or six minutes, and the blood flowed from their horns every time the heart beat. His man said that he was covered with blood and the animals made a noise that might be heard a mile off. When inspected on November 2, the cattle seemed in great pain. There was an opening on the head of some of them large enough for the admission of a man's thumb. Six were discharging pus from the horn cavities, although three of these had been operated upon on October 8. Sawing through the sensitive membranes at the base of the horn caused excruciating pain, and the inflammation following the operation

produced great and prolonged suffering. The operation was most cruel and absolutely unnecessary. No benefit to the animal whatever was derived from it, but it added to its value from about 30*s.* to 2*l.*, and the farmer could stow a larger number of dishorned beasts in his yard. Efficacious remedies for butting or goring were "tipping"—that is, taking 2 or 2½ in. of the horn off at the tip just to touch the quick and no more, or "knobbing," that is, putting knobs on the horns; "budding," that is, making an incision with a knife and removing the core of the horn before the animal was six months old, caused only infinitesimal pain and was the most perfect remedy to prevent goring. Dishorning concealed age, and coarseness of breed. The practice of it had been discontinued in the county of Norfolk more than thirty years ago, and had only recently been renewed. It was not carried out in the Yarmouth division. At the English National Congress of Veterinary Surgeons the practice had been, by resolution, condemned, except when performed as a surgical operation for the benefit of the animal. It was not practised in other counties in England.

Evidence was given for the defence by fourteen witnesses, landowners, and farmers. They admitted that the operation was extremely painful, both at the time and afterwards, but said that it altered the character of the beasts entirely, prevented them from goring, and keeping their fellows away from the feeding troughs, made them graze better and fatten quicker, and saved 25 per cent. of space in the straw yard, and that tipping was of no use. Eleven of these witnesses were not cross-examined, as counsel said they admitted carrying out the practice themselves.

The justices were of opinion that the appellant had proved that the dishorning of the cattle in these cases had caused considerable pain and suffering to the animals, but were satisfied that the respondent had exercised ordinary care in the performance of the operation, and they considered it as proved that the practice of dishorning cattle had been carried on in a part of the county of Norfolk to a considerable extent during the past three or four years; also that the results attained by dishorning could not be attained by merely tipping the horns as suggested

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by some of the witnesses called by the appellant. The justices did not believe that the respondent had any cruel intention in performing the operation, but that he acted under the honest belief that it was for the benefit of the animals themselves, and as well for the benefit of himself as a grazier, and that the object he had in view could not be attained by any other known method; they accordingly dismissed the information laid against him without costs. The question for the opinion of the Court was: "Is the operation of dishorning cattle as proved to have been performed in this case justifiable, having regard to s. 2 of 12 & 13 Vict. c. 92?"

Lumley Smith, Q.C. (*Colam*, with him), for the appellants. On the finding of the justices that sawing off the horns of the oxen caused considerable pain and suffering, the respondent ought to have been convicted. By 5 & 6 Will. 4, c. 59, s. 2, it was enacted that if any person should "wantonly and cruelly beat, ill-treat, abuse, or torture any . . . cow or other domestic animal" the offender should be liable to a penalty. That Act was repealed by 12 & 13 Vict. c. 92, s. 1, and by s. 2 the provision is substituted that "if any person shall cruelly beat, ill-treat, overdrive, abuse or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5*l.*" Inflicting pain without reasonable occasion is now an offence under s. 2, and the facts proved supported the charge. It was not necessary to shew that the respondent's act was wanton, for the word "wantonly" which was used in the former Act is left out of the Act under which the information was laid. Nor was it necessary to prove any intention to torture. It was not denied that the operation of dishorning caused great pain, but the witnesses for the respondent set up counterbalancing advantages. It is said that the operation is necessary to prevent the animals from wounding each other with their horns. But this could be prevented by tipping their horns. The fact that a few more animals can be put into a yard is an advantage only to the farmer, and is not a sufficient excuse for the practice. Dishorning is not usual, and is practised only in a part of one

county in all England. It is not necessary and reasonable, for it causes undue pain having regard to the results sought to be attained. Of course the removal of a horn accidentally broken might be reasonable, and necessary, and for the benefit of the animal itself. Some painful operations on animals are necessary for the benefit of the community, such, for example, as castration, or firing horses, which is a surgical operation. Docking the tails of horses is also usual and, perhaps, beneficial to them. But dishorning is of no benefit whatever to the animal dishorned. Cutting the combs of cocks to fit them for fighting, or winning prizes at shows, has been held to be within s. 2: *Murphy* v. *Manning.* (1) Kelly, C.B., said: "As it does not better fit the animal for the use of man or for any other lawful or proper purpose, it is wholly unjustifiable, and is a criminal act which comes within the statute." In *Brady* v. *McArgle* (2), on evidence similar to that in the present case, the Exchequer Division in Ireland held that the dishorning of cattle was an offence within the Act. In *Callaghan* v. *Society for Prevention of Cruelty to Animals* (3) the contrary was held, but there the justices found that the advantages attainable by the practice were vastly out of proportion to the pain inflicted thereby, provided that the operation be skilfully performed, and the judgment of the Court was based on that finding, and perhaps also on the conclusion of the justices that the suppression of the practice would be attended with enormous loss to Ireland. In *Lewis* v. *Fermor* (4) the operation of spaying sows, performed in a careful and skilful manner by a veterinary surgeon, was held justifiable; but that operation is extensively practised and honestly believed to be beneficial to the owners.

Winch, Q.C. (*H. Winch,* with him), for the respondent. It may be admitted that great pain is caused by the operation of dishorning. But this Act is not directed against the mere infliction of even great pain on animals. The definition of cruelty given by Grove, J., in *Swan* v. *Saunders* (5) "Unnecessary ill-usage by which the animal substantially suffers" is correct. The findings

(1) 2 Ex. D. 307.
(2) 14 L. R. (Ir.) 174; 15 Cox, C. C. 516.
(3) 16 L. R. (Ir.) 325.
(4) 18 Q. B. D. 532.
(5) 14 Cox, C. C., 566, at p. 570.

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of the justices are that the operation was done with ordinary care, and under an honest belief that it was for the benefit of the animals themselves, and as well for the benefit of the respondent himself as a grazier, and that the object he had in view could not be attained by any other known method. On those findings the acquittal of the respondent was right. If the mode of the operation was objectionable it can be performed hereafter more scientifically by a veterinary surgeon. But the respondent desires the opinion of the Court on the general question whether cattle may be dishorned. The object of the operation is to prevent them from goring each other, and also pigs, and other animals, in the yards, and when travelling. The evidence shews that damage is done by goring, and that experience has proved dishorning to be necessary. An animal dishorned does not overmaster his fellows, and is more docile and feeds better. In *Renton* v. *Wilson* (1) horns were sawn off from oxen close to the skull, and it was proved that the operation caused great pain, but that it was in common use throughout Fife, Forfar, and Kincardine as a means of preventing the cattle goring each other when in railway trucks, and the Court held that the operation being a customary operation for a legitimate and useful purpose, was not in contravention of the Cruelty to Animals (Scotland) Act, 1850, 13 & 14 Vict. c. 92. There is also the decision to the same effect, of learned judges in Ireland, where the practice of dishorning has existed for twenty years: *Callaghan* v. *Society for Prevention of Cruelty to Animals.* (2) Mere infliction of pain, even amounting to torture, is not cruelty within the Act, if the pain is necessary. There is evidence that the operation is necessary and beneficial.

Lumley Smith, Q.C., replied.

Cur. adv. vult.

1889. May 18. LORD COLERIDGE, C.J. Having had the advantage of reading what my learned brother Hawkins has written upon this case, with the whole of which, both in substance and in expression, I entirely concur, and to which I refer for a statement of the facts, I should not have written anything

(1) 15 Justiciary Cases, 84 (Scotch).

(2) 16 L. R. (Ir.) 325.

myself, but for the importance of the case and the fact that we appear, perhaps more than appear, to be differing from several authorities greatly to be respected by any judge sitting in this place.

The charge is one under 12 & 13 Vict. c. 92, s. 2. The important words of which are "cruelly abuse or torture," or "cause or procure to be cruelly abused or tortured," and the question is whether the evidence in this case does not make out to demonstration that an offence against the Act has been committed, and that the magistrates should have convicted instead of acquitting the respondent. The question submitted to the Court is, and to this I call particular attention, whether the operation of dishorning cattle, as proved to have been performed in this case, is justifiable under s. 2 of 12 & 13 Vict. c. 92?

Now it is important to settle in one's mind, so far as it can be settled, clearly what is cruelty, and what is cruelly to abuse or torture an animal within the meaning of the statute. The mere infliction of pain, even if extreme pain, is manifestly not by itself sufficient. Men constantly inflict great pain on one another and upon the brute creation, either for reasons of beneficence, as in surgery and medicine, or under sanctions which warrant its infliction, as in war or in punishment. It is further lawful to inflict it if it is reasonably necessary; a phrase vague, no doubt, but with which in many branches of the law every lawyer is familiar. This involves the consideration of what "necessary," and "necessity" mean in this regard. It is difficult to define these words from the positive side, but we may perhaps approach a definition from the negative. There is no necessity and it is not necessary to sell beasts for 40s. more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard, or a railway truck, than could otherwise be packed; nor to prevent a rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary. That without which an animal cannot attain its full development or be fitted for its ordinary use may fairly come within the term "necessary," and if it is something to be done to the animal it may fairly and properly be done.

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What is necessary therefore within these limits, I should be of opinion may be done even though it causes pain; but only such pain as is reasonably necessary to effect the result.

Necessary pain, therefore, thus limited, we may fairly inflict on those animals over which we have been given or have assumed dominion. But I adopt the language of Mr. Justice Wightman in *Budge* v. *Parsons* (1) as for the purposes of interpreting the statute complete and satisfactory, and his language is that "the cruelty intended by the statute is the unnecessary abuse of the animal." His language is approved of by the Court of Exchequer in *Murphy* v. *Manning*. (2) I do not think that the definition given by Grove, J., in *Swan* v. *Saunders* (3) "unnecessary ill-usage by which the animal substantially suffers," though longer, adds anything to the terser language of Wightman, J. Abuse of the animal means substantial pain inflicted upon it, and unnecessary means that it is inflicted without necessity, and under the word "necessity," as I have already said, I should include adequate and reasonable object.

Applying these observations to the evidence in this case, there can be no difficulty in arriving at a determination. In the first place as to necessity, it is found in the case that for twenty years the practice of dishorning has been entirely disused throughout England and Wales. It has not been thought necessary in all that time to perform it on any of the millions of cattle which during that time the farmers of England of all sorts have reared, and sold, or eaten. We learn further from a case of *Renton* v. *Wilson* (4), that except in three counties, Fife, Forfar, and Kincardine, it is unknown in Scotland. It appears that in Ireland it is more common. It is incredible to me, at least, that an operation for many years discontinued in England and Wales, and, with the above exception, in Scotland also, should suddenly have become "necessary" so as to except it, if it be cruel, from the mischiefs against which the statute is directed. It was not unknown, but it has been discontinued. In the evidence before us no ground for it is suggested, except that the animals generally after dishorning sell for more money, that more of them can be

(1) 3 B. & S. 382, at p. 385.
(2) 2 Ex. D. 307.
(3) 14 Cox, C. C. 566, at p. 570.
(4) 15 Justiciary Cases, 84 (Scotch).

packed into a farm yard or a railway truck, and that dishorned animals cannot gore, but can only butt their fellows.

What, however, is the evidence as to the practice which the magistrates of Norfolk have sanctioned and which we are asked to countenance? It is utterly disgusting, but in the interests of common humanity it must be read. It must be read also, because I cannot, nay, I do not believe that evidence so full, so uncontradicted, so detestably brutal in its details could have been given in the cases of *Renton* v. *Wilson* (1) in Scotland and in *Callaghan* v. *Society for Prevention of Cruelty to Animals* (2): in Ireland, cases which no doubt appear to be inconsistent with the judgment we are pronouncing.

The appellant said, "These animals were dishorned on October 15. The animals had no horns on their heads and seemed to be in great pain. There was a discharge coming out of cavities on the top of the heads of two of these cattle, which was flowing down their cheeks. This discharge was pus. The horn on one of these animals had not been sawn off. Some of the horns were more clumsily sawn off than others; all of the horns were sawn off as close to the head as a flat saw could be made to do it. There was an opening on the top of the heads of some of the cattle large enough for the admission of the thumb; on the heads of others there was a depression like what mechanics would call countersinking. The surrounding parts were very tender, and the animals flinched when they were touched even lightly. The respondent entered freely into conversation with him on the subject, and said the operation added to the value of the cattle when he sold them to the extent of about 30*s.* to 2*l.* The respondent shewed the appellant sixteen other cattle which had been dishorned on October 8, three of which were sloughing and pus running down their cheeks, although these had been operated on twenty-five days. The respondent said he was present a part of the time when the animals were dishorned, and he described the process to the appellant. He said the beasts were placed between two waggons one at a time, a plank being put behind the animal so that it could not run back. The plank was secured to two stout oaken posts between which its head was

(1) 15 Justiciary Cases, 84 (Scotch). (2) 16 L R. (Ir.) 325.

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fixed as in a vice. Two of his men held the animal's head, whilst a third sawed the horns off with a common saw. The appellant said that he saw a good deal of blood upon the posts to which the cattle were tied, and blood also at the entrance to the cattle shed, where they were driven in after being operated upon, and blood all along the passage, and the door and the posts inside the shed were smeared all over with blood, while on the walls higher than he could reach there were marks of blood as if made by a syringe which had spouted out from the animals. I pointed out these marks to the respondent, who said, 'The bullocks generally bleed five or six minutes after they get in here, and the blood flows from the horns every time the heart beats.' I asked a man named Feek, employed by the respondent on the occasion, 'Did the animals make much noise during the operation?' and Feek said, 'I should think they did; you might have heard them a mile off. I told Mr. Wiley I would not do it again.' Feek said, 'I will never do it again. I was covered with blood, and so were all the others. I don't want any more of it, I can tell you; one of them got down and we had to saw the horn off lying down.'"

Frederick Booty Last, sworn, deposed:—He was a veterinary surgeon, and had been in practice in the county of Norfolk for thirty-five years, and during that time his practice had been amongst cattle. He was with the last witness during the visit to respondent's farm. He saw thirty-two beasts two years old, six of which were discharging pus from their horn cavities, and were suffering much pain. They were sick and looked shrunken. They had been dishorned close to their heads. Some of the horns had been taken off clumsily. Some were sawn right into the base of the skull. The age of two years was a bad age for the operation to be performed, because there is more flesh and consequently more vascular tissue round the base of the horn at that time than previously. The operation was most cruel. Until recently it had not been practised in the county for thirty years. He had been all his life attending on cattle, but had never seen the necessity for dishorning. If 2 inches or 2½ inches were taken off the tips of the horns of a butting beast, just to touch the quick and no more, it would prevent "butting." He had never

known a case in which this method had been tried without curing the animal of "butting." The operation was not beneficial to the animals, but it enabled the owner to realize one or two pounds more for them when sold. The coarser the breed of animals the coarser are its horns, and by removing its horns the natural coarseness of the animals was concealed from the buyer. Cattle artificially polled could be sold for naturally polled cattle in some cases, but dealers could not be deceived. No benefit to the animal whatever was derived from the operation, but the dealer profited, and the farmer could stow a larger number of animals in his yard. The operation did not improve the quality of the meat, in fact, it gave no advantage to the public nor to the animal, but only to the owner.

Then important evidence was given as to the operation :—

Professor Walley, sworn, said: He had been principal of the Royal (Dicks) Veterinary College, Edinburgh, many years, and had made the dishorning of cattle a special study for fourteen years. He produced a section of the horn. He described the membranes and structure of the horn and said . . . . "Under inflammation the membrane becomes exceedingly sensitive, and thickened granulations (proud flesh) form upon it and during the continuance of the inflammation much pain and suffering is caused. . . ." Then he says, "Every tooth of the saw as it tears through the structure causes excruciating pain and the inflammation following the operation causes great and prolonged suffering. Cutting through the sinus is excessively painful and very cruel. The pain would be excruciating at the time and would be continued more or less for a fortnight and probably longer. Inflammation would ensue and then pus would be discharged. The pain was caused by cutting the sensitive tissues like cutting through the quick of a man's finger, and thus intense suffering is inevitable when the horn is cut close to the skin. The tips of the horns could be removed without causing inflammation. That operation was called 'tipping' and was resorted to to prevent butting. He had never known a case of tipping to fail as a remedy for butting during his long experience in Scotland." At the English National Congress of Veterinary Surgeons assembled at Peterborough, resolutions were passed condemnatory of the

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practice of dishorning, except when performed as a surgical operation for the benefit of the animal.

Professor McColl, many years Principal of the Glasgow Veterinary College, sworn, said:—"I entirely endorse the evidence against dishorning given by Professor Walley. It causes extreme torture at the time and afterwards for several days. It does not benefit the animal. It was gross cruelty to remove the whole of the horn. Suppuration is a sign of pain, for then there is inflammation."

Professor Collins, sworn, said: "He was a Fellow of the Royal College of Veterinary Surgeons. Had been in practice thirty-five years, and had studied the subject while in the service of the government, and since during his practice of 7½ years in Ireland where he had much cattle practice." He says that in Ireland, the horns are taken off chiefly to "conceal their age and to get more money for them."

Mr. George Andrews Leper, a Fellow of the Royal College of Veterinary Surgeons, "agreed with the previous witnesses that dishorning was a cruel practice causing fearful pain and absolutely unnecessary."

Professor William Pritchard, President of the Royal College of Veterinary Surgeons in London, many years Professor at the College at Camden Town, "entirely agreed with the evidence which had been given that the operation of dishorning caused extreme pain, and that it was unnecessary."

Similar testimony was given by six or seven other eminent men, all of them disconnected with the case; some coming from Scotland and others from different parts of England, cattle doctors, not sentimentalists but men of the world, men of sense, men dealing with scientific matters in a scientific way.

Then comes the evidence on the other side.

Mr. Sapwell, a landowner and farmer in Norfolk, says "that he does not deny that the animals suffered great pain;" and Mr. Clare Sewell Read, says the operation was bound to cause very severe pain indeed, but he had never seen it done. The rest of the witnesses for the respondent say that the operation makes the animals of more value; that without it it is not possible to stow thirteen bullocks in a yard twenty-five yards

square, which is of course perfectly true: "It is cruel first and kind afterwards; butchers pay more for polled than for horned beasts."

Now against this there was absolutely no evidence of fact except that beasts in Norfolk gore and injure their fellows apparently to an altogether abnormal extent. All through England and Wales, north and south, east and west, except in Norfolk we see cattle grazing in the fields or standing in farmyards and grazing or feeding armed or ornamented with their horns apparently in perfect peace and safety. The evidence, such as it is, is directed not so much to deny the horrible suffering occasioned by the operation, but to justify it on the grounds that I have stated. I do not doubt that dishorned beasts sell for rather more, that the same space will contain more cattle dishorned than horned, that the practice disguises the breed to a superficial or unskilled observer, and deceives, or may deceive, the butcher. But I emphatically deny that any or all of these reasons are reasons of necessity or justify the operation. Necessity to form an excuse under the statute does not mean, as I have explained, simply that the effect of an operation cannot be otherwise secured. There must be proportion between the object and the means. Mutilation of horses and bulls is necessary, and, if properly performed, undoubtedly lawful; because without it, in this country at least, the animals could not be kept at all. But to put thousands of cows and oxen to the hideous torments described in this evidence in order to put a few pounds into the pockets of their owners is an instance of such utter disproportion between means and object, as to render the practice as described here not only barbarous and inhuman, but I think clearly unlawful also. I am not afraid of the possible application of the principle to other practices which have not yet been attacked, but which may hereafter turn out to be prohibited by law. If the suffering inflicted is necessary, as I have tried to explain it, it may be inflicted; if not, it is "unnecessary abuse of the animal," and we have neither the moral nor the legal right to inflict it, a conclusion not of sentimentalism but of good sense.

It remains only to say a word as to the cases from which we appear to be differing. *Budge* v. *Parsons* (1); *Murphy* v. *Man-*

(1) 3 B. & S. 382.

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ning (1), and *Brady* v. *McArgle* (2), are cases which I desire to follow and to rest upon as I agree entirely with the decisions and the reasons given for them. The last named case was decided by the Court of Exchequer in Ireland, consisting of Dowse, B., and Andrews, J., and I beg leave to refer to the able judgments delivered by those learned judges, expressly to that portion of Baron Dowse's, to be found in the latter part of p. 523, as expressing in better language than any I can use, what I desire to say upon the true test of cruelty under the statute. Of the Scotch case and the other Irish case to which I have already referred, I desire to say only this. For the Courts, and for the judges who composed the Courts which decided them, no English lawyer can feel anything but unfeigned respect. We have not the evidence before them set out in detail, and I will not presume to say that if I had been in their place I might not arrive at the same conclusion which they did upon that evidence. But I take the freedom to doubt altogether whether if they had heard or read the evidence given before us, they could possibly have arrived at any other conclusion than that at which my learned Brother and I have arrived in this case. I cannot think that on this evidence Morris, L.C.J., would have thought "the pain inflicted to be very temporary" or "the object reasonable and adequate;" or that Lord Young in the Scotch Case (p. 89), would have said that the statute did not in such a case as this "interfere with the judgment of those who are pursuing their own affairs to the best of their judgment as the farmers of Forfar and Fife are doing here, however much they may be mistaken in the judgment of others." Upon the decision in *Lewis* v. *Fermor* (3) we are not called upon to observe. It is upon a different operation, and is open to different considerations. But if my brother Hawkins is right in the view which he has taken of the reasoning on that case, I desire to say that I concur in the observations he has made upon it, and I respectfully dissent from it. I concur also in the observations he has made on the brutalizing effect of such an operation performed regularly on thousands of cattle upon those who perform it.

(1) 2 Ex. D. 307.

(2) 14 L. R. (Ir.) 174; 15 Cox, C. C. 516.

(3) 18 Q. B. D. 532.

For these reasons I am clearly of opinion that in this case the magistrates ought to have convicted, and the case must be remitted to them to do with it according to what we hold to be the law.

HAWKINS, J. In this case I should have been quite content to express my cordial concurrence in the judgment which my Lord has just pronounced, but the great importance of it to a large community makes me think I ought to express my own independent views.

The appellant was the prosecutor of two informations against the respondent, charging him under 12 & 13 Vict. c. 92, s. 2, with having ill-treated, abused, and tortured thirty-two oxen in the month of October, 1888. These informations came on to be heard before five justices of the peace for the county of Norfolk —who dismissed them—subject to a case (1), wherein the sole question submitted for our consideration is, whether the operation of dishorning cattle, as described, is justifiable having regard to the statute above mentioned. Mr. Winch, for the respondent, has rightly asked us to consider and dispose of the case, not upon any narrow or technical grounds, but upon the broad question whether the practice of dishorning for the purposes stated in the case is lawful or not; so that our decision may be a guide to all who are interested in the subject. We have accordingly so considered it.

In my opinion the practice is illegal, and ought to be suppressed.

The 12 & 13 Vict. c. 92, is entitled, "An Act for the more effectual prevention of cruelty to animals." By s. 1 the previous Acts 5 & 6 Wm. 4, c. 59, and 7 Wm. 4, and 1 Vict. c. 66, relating to the same subject, are repealed. By s. 2, it is enacted "that if any person shall from and after the passing of this Act cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured any animal," such offender shall be subject to such punishment as is prescribed by that statute.

(1) A copy of the case with a diagram of the horn was appended to the judgment; but it is considered that for the purposes of this report the case is sufficiently recited in the judgment of the Lord Chief Justice.

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In construing this section, I am of opinion that the word "cruelly" runs through and governs the whole sentence, and that to bring a person within the operation of that section he must be proved to have cruelly committed the act charged against him.

Now what is the meaning of the expression "cruelly"?

In *Budge* v. *Parsons* (1), Wightman, J., said, "the cruelty intended by the statute is the unnecessary abuse of the animal." In *Swan* v. *Saunders* (2) Grove, J., says it means "unnecessary ill-usage by which the animal substantially suffers." In Webster's Dictionary it is defined to be "an act which causes extreme suffering without good reason."

To my mind it is immaterial for the purposes of the present case which of these definitions is adopted—either is sufficient to dispose of it.

To support a conviction then, two things must be proved—first, that pain or suffering has been inflicted in fact. Secondly, that it was inflicted cruelly, that is, without necessity, or, in other words, without good reason.

That the operation of dishorning, as described in the case, is accompanied by excruciating torture is beyond all question. Any one who could read that description and reflect for a moment upon the agony of the poor mutilated creatures without being painfully touched with commiseration must be devoid of all pity for the miseries and distresses of God's creations, and he who could willingly inflict such suffering, unless under direct necessity, must indeed be cruel in heart, and insensible to every dictate of humanity.

What amounts to a necessity or good reason for inflicting suffering upon animals protected by the statute is hardly capable of satisfactory definition—each case in which the question arises must depend upon a variety of circumstances; the amount of pain caused, the intensity and duration of the suffering, and the object sought to be attained, must, however, always be essential elements for consideration. To attain one object the infliction of more pain may be justified than would be ever tolerated to secure another.

(1) 3 B. & S. 382, at p. 385. (2) 14 Cox, 570; S.C. 50 L. J (M.C.) 67.

It would be unreasonable to claim for domestic animals designed for man's use absolute immunity from all suffering at the hand of man; and it would not be contended by the strongest advocates of the cause of humanity that pain to some extent may not be reasonably inflicted with a view to save an animal's life, to cure it from sickness or injury, or to fit it to fulfil the part for which by common consent it is designed. In each case, however, the beneficial or useful end sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist. To save the life of an animal, to restore it to health when suffering from painful disorder, violent measures, causing much misery to it, may oftentimes be matter of necessity; a wounded or diseased limb, or an injured eye, may require surgical treatment inseparable from pain; these are illustrations of cases in which the pain caused is for the direct benefit of the animal itself. As an illustration of a class of cases in which some degree of apparent ill-treatment may be justified in fitting an animal for its legitimate use, I may point to a horse, which though designed for draught and riding purposes, is not in its natural untutored state so fitted. To prevent it from being unruly and unsafe, it requires to be broken, sometimes with a degree of severity, occasioning pain, which without such necessity would be utterly unjustifiable. But even in these cases the good to be attained must be reasonably proportionate to the suffering caused.

Castration of young horses, and of the male young of other animals intended for use or for food, is, we all know, largely practised for the purpose of rendering them more docile and less dangerous to use, and more adapted for food than uncastrated males commonly are, but I am far from saying that in my opinion castration, which is a painful operation, though not of long duration, is in all cases justifiable. I could, were it necessary to do so, suggest many circumstances in which in my judgment it would be utterly unreasonable because unnecessary.

Docking is another painful operation, which, no doubt, may occasionally be justified; but I hold a very strong opinion against allowing fashion, or the whim of an individual, or any

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number of individuals, to afford a justification for such painful mutilation and disfigurement.

I have said enough to indicate my views, namely, that the legality of a painful operation must be governed by the necessity for it, and even where a desirable and legitimate object is sought to be attained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable the object should be abandoned rather than that disproportionate suffering should be inflicted.

This brings me to the consideration of the reasons which are suggested on behalf of the respondent by way of justification for the revolting operation of dishorning.

Those reasons, shortly stated, are as follows:—That the operation makes the cattle graze better and fatten more quickly; that it alters their character and makes them quiet; that it prevents them, if viciously disposed, from goring and injuring other cattle and animals in the same yard with them; that more polled than horned cattle can be accommodated in a straw yard, and that the practice has been prevalent in some parts of the country for years among farmers and dealers, who look upon the practice as advantageous to them for the reasons above given; and, lastly, that the results attained by dishorning could not be attained by any other known means. That the animals themselves are in the least degree benefited by the operation was not seriously suggested, and to me such an idea seems utterly untenable. That it alters their character may be true enough, it is highly calculated to do so.

It may be too, that so altered they more rapidly fatten, and sometimes are more quiet in the straw yard, and it requires no great amount of evidence to prove that more dishorned than horned cattle can be accommodated in the same straw yard, and that if required to travel more can be packed into a railway truck, and finally that by dishorning, each head of cattle may in one way or another be rendered of more value to the owner to the extent of from 20*s.* to 40*s.* But how is this benefit derived? Not by utilising the animal as nature formed it, viz. as a horned animal, not even by a curtailment of its horns by the compara-

tively painless operation of tipping or knobbing, but by artificially altering the character and species of the animal altogether, and converting the horned animal into a polled one, and that by means of so torturing an operation that one shudders to think men can be found to perform it.

Is there, can there be, legal necessity or reason for this? My answer is, No. I fail to see any evidence of such necessity or reason.

No owner is compelled by any necessity to turn his horned into dishorned or artificially-polled cattle, or to put into the same yard the same number of horned cattle as he would of polled ones.

If he wishes for polled cattle he can buy naturally-polled animals, though it may be at a small extra price. If, however, to avoid that outlay, he prefers to buy horned cattle, and to enhance their value by 20s. or 40s., by mutilating them at the expense to the poor animals of excruciating torture, how can this be said to be either necessary or reasonable?

Is it necessary that such an end should be attained at such a sacrifice? If not, then the operation is an unnecessary abuse of the animal, and brings the case distinctly within Mr. Justice Wightman's definition of cruelty.

But a striking body of evidence that such an operation is unnecessary and unreasonable is to be found in the fact that throughout vast districts, both in England and Scotland, thousands upon thousands of horned cattle are to be seen, many herding together peacefully enough, grazing in the same fields, confined in the same yards, feeding, thriving and fattening together, and packed together in railway trucks for transportation to market.

It may be that occasionally one of such animals may give a little more trouble than the rest, nevertheless, the farmers, graziers and dealers throughout those districts (which in England comprises the whole country, except the parts of Norfolk and Suffolk above referred to), gentlemen quite as alive to their own interests as those who have adopted this cruel practice, have not for years attempted to adopt it as a remedy for such occasional inconveniences. Is not this abundant proof that dishorning is

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not necessary for the benefit of the animal or to render it fit for all the legitimate purposes of its owner, and that tipping or knobbing have been found to be and are practically sufficient?

In Ireland, and in some counties in Scotland, no doubt, the practice has prevailed, and oftentimes for the purposes of fraud and deception, as will be seen from the evidence of Professors McColl and Collins, and it must not be forgotten that the Highland Agricultural Society, fifteen years ago, denounced the operation as a cruel practice, and still condemns it.

But cases were cited to us as authorities that no operation, however painful, is cruelty within the meaning of the statute "if the purpose for which the act is done is to make the animal more serviceable for the use of man;" this is the dictum of Cleasby, B., in delivering his judgment in *Murphy* v. *Manning*. (1) In using this language that learned and very humane judge ought not to be taken to have spoken having reference to such circumstances as are now before us, but only generally with respect to certain minor operations, which, though painful, cannot be placed in the same category as this. If the learned Baron did intend his language to be interpreted as contended for the respondents, then I most respectfully decline to adopt that view. Many instances might be put in which, at the cost of extreme suffering to the animal, it might be rendered more serviceable for the use of man by means of an operation which it is impossible to suppose that any legislature would sanction.

What would be said of a man who sewed up the eyelids of his sheep, or cut the hoofs of his cattle to the quick to keep them from moving about as nature dictated, in order that they should more quickly fatten in his field for his profit? But the decision in *Murphy* v. *Manning* (1), carefully looked at, is, so far as it has any bearing on this case, in favour of the appellant's views. There the accused was charged with cruelty in cutting off the comb of a cock. It was contended that the act was justified, among other reasons, because without it the cock could not win prizes for his owner. The Court (Kelly, L.C.B., Cleasby, B.,) held that the man ought nevertheless to have been convicted. Before I deal with the next authority cited for the respondent, I must

(1) 2 Ex. D 307, at p. 314.

refer to the case of *Brady* v. *McArgle* (1), where this very practice of dishorning was condemned as cruelty. There it was contended for the accused that the practice was allowable upon much the same grounds as those above enumerated. In that case the magistrates had refused to convict. The Court, however (Dowse, B., and Andrews, J.), held that he ought to have done so, Dowse, B., after referring to the dictum of Cleasby, B., saying that he could not hold that the operation better fitted, or made the animal more serviceable for the use of man, that the acts were done for the convenience of particular individuals, and for their contingent profit, and he made use of this expression: "Nobody can contend that it was absolutely necessary to cut off their horns, and in my view it was eminently unreasonable." Andrews, J., said: "That the dishorning was not done wantonly, but for the purpose of convenience and profit, is not in itself a sufficient defence. It ought to be shewn to be necessary or reasonable under all the circumstances." In the following year, 1885, the same question was practically raised in *Callaghan and Another* v. *Society for the Prevention of Cruelty to Animals* (2), when a different judgment was pronounced by Morris, C.J., and Harrison and Murphy, JJ. This case is, of course, strongly relied upon by the respondents, the facts and arguments substantially were the same as in this case. Morris, C.J., in delivering his judgment, said: "Looking at the suffering in reference to the object with which it is inflicted as found by the magistrates, it cannot in my opinion be considered unnecessary, for the object is reasonable and adequate;" Harrison, J., also treated the practice as a reasonable one and necessary for the proper carrying on of the system of strawyard winter feeding; whilst Murphy, J., said: "The pain caused to the animals cannot be said to be an unnecessary abuse of the animal that is reared up, tended, and fed with the object of having it as soon as possible made ready for slaughter, if the operation by which the pain is caused enables the owners to attain this object either more expeditiously or more cheaply." In the views expressed by these learned judges I am unable to concur.

(1) 14 L. R (Ir.) 174; S.C. 15 Cox, C. C. 516.

(2) 16 L. R. (Ir.) 325; S.C. 16 Cox, C. C. 101.

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In the case of *Lewis* v. *Fermor* (1) the Court (Day and Wills, JJ.) upheld the decision of magistrates in dismissing a charge of cruelty for spaying sows upon the ground, as I read the case, that honest belief that the act was justified, even though that belief was erroneous, prevented the application of the statute. Day, J., said "cruelty must be something which cannot be justified, and which the person who practices it knows cannot be justified." Wills, J., said, "the proper view is that if the person who performs the operation entertains an honest belief that what is done will benefit the animal, he is not liable to be convicted." Now I am not concerned in forming any opinion whether or not the operation in that case amounted to cruelty, but I shall have a word or two to say in reference to those dicta, after I have called attention to the case of *Renton* v. *Wilson* (2), argued before Lords Young, McLaren, and Rutherfurd Clark, which is the last authority I think it necessary to mention. That also was a case of cruelty for dishorning; there again the practice was upheld, not however upon the ground that the operation was not painful, or that it was necessary, but upon the ground, as explained by Lord Young, "that the statute does not interfere with human conduct or with the judgment of those who are pursuing their own affairs to the best of their judgment, however much they may be mistaken in the judgment of others," and according to the view of Lord McLaren, because the operation was a "customary operation" to a considerable district of the country, and "performed with a view to a rational purpose, and under the belief that it is necessary for the well-being and control of the animals."

I cannot give my assent to this decision, nor recognise in these views anything which excuses the infliction of such extreme suffering.

With all respect to the opinions of the learned judges by whom these two cases of *Lewis* v. *Fermor* (1) and *Renton* v. *Wilson* (2) were decided, although I am not prepared to deny that an honest belief based on reasonable grounds in the existence of circumstances which if proved would justify a painful operation, would afford him a defence against a charge of cruelty, even though the circumstances relied on were not as he believed them to be.

(1) 18 Q B. D 532. (2) 15 Justiciary Cases (Scotch) 84.

I do dissent from any notion that a mistaken belief, however honest, that the law justified a painful operation, when in truth it did no such thing, could operate as any excuse at all, except, perhaps, in mitigation of punishment.

If the law were that any man or any body of men could in his or their own interests, or for his or their pecuniary benefit, cause torture and suffering to animals without legitimate reason, and could, when charged with cruelty, excuse himself or themselves upon the ground that he or they honestly believed the law justified them, though in fact it did not, it is difficult to see the limits to which such a principle might not be pushed, and the creatures it is man's duty to protect from abuse, would oftentimes be suffering victims of gross ignorance and cupidity.

Before I conclude I must observe that in this case, as in others cited before us, the operation has been performed indiscriminately upon whole herds of cattle at a time without regard to age, sex, habits, or tempers, not because any of them have shewn themselves to be dangerous, or exhibited the least trace of temper or unruliness, but because possibly hereafter in some feeding-yard some one or more of them may turn out to be troublesome, and because the operation may, for some reason or other, add a few shillings to their price when sold; the animals thus operated upon each year amount in number to tens of thousands. Constant familiarity with unnecessary torture to and abuse of dumb animals cannot fail by degrees to brutalize and harden all who are concerned in or witness the miseries of the sufferers, a consequence to be scrupulously avoided in the best interests of civilized society.

From what I have already said, and for the reasons I have given, it follows that in my opinion the practice of dishorning is a cruel, unreasonable, and unnecessary abuse of the animals operated on, and therefore is illegal and ought to be suppressed, and that the magistrates ought to have convicted the respondent.

Solicitor for appellant: *A. Leslie.*

Solicitors for respondent: *Johnson, Harrison, & Powell.*

J. R.

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June 21.

[IN THE COURT OF APPEAL.]

IN RE BRADBROOK. EX PARTE HAWKINS.

Bankruptcy—Evidence—Discovery of Bankrupt's Property and Dealings—Summons to attend Court for Examination—Illness of Person summoned—Power to direct Examination to be held out of Court—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 27—*Bankruptcy Rules,* 1886, *r.* 66.

When a person, who has been summoned for examination under s. 27 of the Bankruptcy Act, 1883, for the purpose of giving information as to the property and dealings of a bankrupt, is unable through illness to attend the Court, the Court has power, under rule 66 of the Bankruptcy Rules, 1886, to order the examination to be held before an officer of the Court at the witness's own residence.

APPEAL ex parte by the trustee in the bankruptcy of T. F. Bradbrook against the refusal by the registrar of an application by the trustee that he might be at liberty to examine one Liebrecht (a person who had been served with a summons under s. 27 of the Bankruptcy Act, 1883, requiring him to attend at the court to give evidence in the matter of the bankruptcy), at the residence of Liebrecht, before any officer of the Court, or any other person, as the Court should direct. Liebrecht did not attend at the time mentioned in the summons. There was evidence that he was in such a state of health that an examination in court would endanger his life, but that he could give evidence if he were examined at his own house.

The registrar refused the application on the ground that the case of *In re Hewitt* (1) shewed that he had no jurisdiction to make the order asked for, and that rule 66 of the Bankruptcy Rules, 1886, under which the application was made, applied only to evidence in a litigation actually pending, and not to an examination for the purpose of discovery.

The trustee appealed.

Herbert Reed, for the appellant. Sect. 27 of the Bankruptcy Act, 1883, enables the Court to summon persons for examination for the purpose of discovery as to the property and dealings of a

(1) 15 Q. B. D. 159.

bankrupt, and then (1) rule 66 gives the Court power in such a case as the present to direct that the examination shall be had at any suitable place. "Before the Court" does not necessarily mean in the court in which the registrar or judge ordinarily sits; it means that the person is to be brought before the Court so as to be subject to its authority. In *In re Hewitt* (2) the Court held that s. 27 did not apply to the administration of the estate of a deceased insolvent under s. 125, and that jurisdiction to examine for the purpose of discovery, not being given by the Act, could not be conferred by a rule. The Court of Bankruptcy is a branch of the High Court of Justice, and as such has jurisdiction in any place in England. The jurisdiction of a registrar in bankruptcy is larger than that of a master of the High Court in chambers: Bankruptcy Act, 1883, ss. 97, 99, 168. Rule 5 of Order XXXVII. of the Rules of Supreme Court, 1883, is similar to rule 66, and in *Warner* v. *Mosses* (3), Jessel, M.R., while holding that in that particular case there was no jurisdiction to make an order which had been made in chambers for the examination of witnesses before an examiner, admitted that such an order could be made under rule 5 when it appeared to be "necessary for the purposes of justice."

LORD ESHER, M.R. I think the point is plain enough.

The registrar issued a summons under s. 27 of the Bankruptcy Act, 1883, requiring a person named Liebrecht to attend at the court and give evidence. There can be no doubt as to the jurisdiction to make that order. The summons was issued and served on Liebrecht, and the moment it was served the requirements of s. 27 were fulfilled. The person summoned was then before the Court, and it was his duty to attend the court at the time appointed, unless he should be prevented by some sufficient cause. If he is prevented from attending by illness which makes it dangerous to his life that he should attend, what is to be done?

(1) Rule 66: "The Court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms (if any) as the Court may direct."

(2) 15 Q. B. D. 159

(3) 16 Ch. D. 100.

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Lord Esher, M.R.

It seems to me that rule 66 in terms applies to such a case. There is nothing to confine the meaning of that rule to anything less than the ordinary signification of the words, and I can see no reason why their meaning should be cut down. There is every reason why the words should receive their full signification. When the witness who has been summoned is unable to attend the court, it is "necessary for the purposes of justice" that he should be examined elsewhere. The decision in *In re Hewitt* (1) does not apply, and the judgment of Jessel, M.R., in *Warner* v. *Mosses* (2) is really an authority in favour of the application.

LINDLEY, L.J. I am of the same opinion. It is important that there should be some mode of taking the evidence of a person who has been summoned under s. 27, and who is unable to attend the court. Independently of the question whether the Court has an inherent jurisdiction to make such an order, I think s. 66 gives power to order the evidence to be taken elsewhere than in court. *In re Hewitt* (1) does not touch the present case. There the question was, whether, in the administration of the estate of a deceased insolvent under s. 125 of the Bankruptcy Act, 1883, there was power to summon a person for examination under s. 27. The Court held that s. 27 did not apply to an administration under s. 125, and that consequently rule 66 did not apply so as to enable the Court to summon a witness for the purpose of discovery. There is nothing in that case contrary to what we are now deciding, except, perhaps, some general observations made by Cave, J. But he was thinking of a case to which s. 27 did not apply. When once jurisdiction is given to summon a person for the purposes of discovery, I think rule 66 applies, and enables the Court to direct, when it is necessary for the purposes of justice, that the examination shall take place out of court.

LOPES, L.J. I entertain no doubt that, under the combined operation of s. 27 and rule 66, the registrar had power to make the order asked for. I think that *In re Hewitt* (1) has no application.

Appeal allowed.

Solicitor: *R. Raphael.*

(1) 15 Q. B. D. 159. (2) 16 Ch. D. 100.

W. L. C.

[IN THE COURT OF APPEAL.]

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April 13.

LISTER *v.* WOOD.

Practice—County Court, Application for Prohibition to—Appeal to Court of Appeal—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 128—*New Trial in County Court—Action struck out for Want of Jurisdiction*—9 & 10 *Vict. c.* 95, *s.* 89—30 & 31 *Vict. c.* 142, *s.* 14.

An appeal lies without leave from the decision of a Divisional Court upon an application for a prohibition to a county court.

A county court judge struck a case out under s. 14 of the County Courts Act, 1867, for want of jurisdiction, but subsequently, being of opinion that his decision as to jurisdiction was erroneous, ordered a new trial:—

Held, that he had power to order a new trial in such a case.

APPEAL from the order of the Queen's Bench Division (Huddleston, B., and Manisty, J.) refusing an application for a prohibition to a county court.

The facts were as follows: An action of trespass to land having been brought in the county court, the defendant alleged in defence a right of common in respect of a farm occupied by him, which the plaintiff denied, and, on the case coming on for trial on November 10, 1888, the question was raised on behalf of the defendant whether the county court had jurisdiction under the 12th section of the County Courts Act, 1867, which was then in force, having regard to the respective values of the defendant's farm and the land over which the right of common was claimed. The county court judge held that he had not jurisdiction and struck the case out on the ground of want of jurisdiction under the 14th section of the County Courts Act, 1867. Subsequently, however, being doubtful whether his decision as to jurisdiction was not erroneous upon the true construction of the 12th section, he gave leave to the plaintiff to give notice of an application for a new trial, which was accordingly done: and upon the hearing of such application on January 12, 1889, the county court judge ultimately granted a new trial. The defendant thereupon applied to the Queen's Bench Division for a writ of prohibition to the county court, which was refused.

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Macaskie, for the plaintiff, took the preliminary objection that in the absence of leave to appeal from the Divisional Court there was no appeal in such a case by reason of the provisions of s. 128 of the County Courts Act, 1888, which provides that an application for a prohibition to the High Court shall be proceeded with and heard in the same manner in all respects as an appeal duly brought from the decision of a county court judge; and s. 45 of the Judicature Act, 1873, which provides that the determination of a county court appeal shall be final unless special leave is given by the Divisional Court.

Channell, Q.C., and *Courthope-Munroe*, for the defendant. Clearly, in cases of application for prohibition to a county court, the appeal exists, as in other cases of prohibition, unless there has been some statutory provision taking it away. Sect. 128 of the County Courts Act, 1888, only deals with procedure in the High Court in the case of an application for a prohibition to the county court. The form of the proceeding is by the section altered into one between the parties, instead of, as formerly, one between the party applying and the judge of the county court. There is nothing in the scope of the section to take away the right of appeal to the Court of Appeal. Appeal is not a matter of procedure but of substantive right. [They cited *Barton* v. *Titmarsh* (1); *Reg.* v. *Kettle*. (2)]

Macaskie, in reply. The section deals with more than mere procedure, and was intended to put an application for a prohibition to a county court in precisely the same position as an ordinary county court appeal.

FRY, L.J. We think that the preliminary objection fails. There is no doubt that prior to the passing of the County Courts Act, 1888, in a case where a writ of prohibition to a county court judge was applied for, the decision on such application was the subject of an appeal, inasmuch as the Judicature Act, 1873, gave a general right of appeal from orders of the Divisional Court. The inquiry must therefore be whether the 128th section of the County Courts Act, 1888, has taken away the right of appeal in such a case. It is to be observed that sects. 127 and 128 of

(1) 49 L. J. (N.S.) 573 (Exch. D.). (2) 17 Q. B. D. 761.

that Act both deal with applications for prohibition in the High Court. Sect. 127 gives power to a single judge of the High Court to deal with such applications; and then s. 128 provides as follows: "When an application shall be made to the High Court or a judge thereof for a writ of prohibition addressed to any Court, the matter shall be finally disposed of by order, and no declaration or further proceedings in prohibition shall be allowed. "Upon any such application"—which obviously means an application to the High Court or a judge thereof—"the judge of the Court shall not be served with notice thereof, and shall not, except by the order of a judge of the High Court, be required to appear or be heard thereon, and shall not, except by such order, be liable to any order for the payment of the costs thereof." The section then provides that "the application shall be proceeded with and heard in the same manner in all respects as any case of an appeal duly brought from a decision of a judge." What application is meant? Clearly the application before mentioned, viz., "one to the High Court or a judge thereof." It seems to me plain that the section is not dealing with an application by way of appeal to this Court. Furthermore, the section says: "shall be proceeded with and heard in the same manner." The "manner of proceeding with and hearing" does not seem to me to involve any question of the conditions precedent to the bringing of an appeal. I think, therefore, that, even if the words of the section did relate to proceedings in this court, which I think they do not, they would not affect the conditions precedent to the right of bringing the appeal. It would be a different thing if the section had said that any application to the Court of Appeal should be heard in the same manner and subject to the same conditions as in the case of an appeal from a decision of a county court judge. Then I think the conditions to which such right of appeal is subject would have been imported. Therefore the matter stands thus: There was, before the passing of this enactment, a general right of appeal, which would include cases of application for a prohibition: and the section is simply dealing with the procedure on the application for a prohibition to the High Court, and has nothing to do with the conditions of appeal to this Court in the case of such an application.

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LOPES, L.J. There was an existing right of appeal in such a case as this before the County Courts Act, 1888, and such right of appeal, unlike the right of appeal in ordinary county court appeals, was without any leave from the Divisional Court. That being so, it is necessary to consider the words of s. 128 to see if it has made any alteration in this respect. The words relied on are: "The application shall be proceeded with and heard in the same manner in all respects as any case of an appeal duly brought from a decision of a judge." The first question is, what is meant by "the application." To determine that, reference must be made to the earlier part of the section. The section begins: "When an application is made to the High Court or a judge thereof." Therefore, "the application" means the application in the High Court. It is also to be observed that the section does not say that the application is to be heard in the same manner, and subject to the same conditions, as an appeal from a decision of a county court judge, but only in the same manner as such an appeal. My view of the section is that it relates to procedure, and only to procedure, in the High Court, and leaves the right of appeal in such a case as this in the same position as before the Act.

Channell, Q.C., and *Courthope-Munroe*, for the defendant. The county court judge has no jurisdiction to order a new trial where he has struck the case out for want of jurisdiction under s. 14 of 30 & 31 Vict. c. 142. (1) Having acted under that section he is functus officio. There never has been a trial of the action, and therefore there cannot be a new trial. The appropriate remedy was not application for a new trial, but for an order in the nature of a mandamus to hear and determine. The form of order for a new trial given in the Appendix to the County Court Rules provides that the judgment shall be set aside. There could be no judgment to set aside where the case was struck out. (2)

(1) The corresponding section of the County Courts Act, 1888, is s. 114.

(2) The question as to the jurisdiction of the county court under s. 12 of the County Courts Act, 1867, was also partially argued, and it was contended for the defendant that under that section the county court judge had no jurisdiction. The point was raised whether, if the right of common claimed taken alone was of less value by the year than 20*l.* there was

Macaskie, for the plaintiff, was not called upon on this point.

FRY, L.J. In this case the county court judge, when the case first came before him on November 10, 1888, thought that he had no jurisdiction; and accordingly, in the terms of s. 14 of 30 & 31 Vict. c. 142, he ordered the cause to be struck out for want of jurisdiction. It appears that, his attention being subsequently again drawn to the matter, he gave leave to make an application for a new trial; and on January 1 in the present year notice was given of such an application. That application came on for hearing before the county court judge on January 12, and he granted it. Then a writ of prohibition was applied for and refused by the Divisional Court, whereupon an appeal was made to this Court. The question whether the county court had jurisdiction turns on the terms of the 12th section of 30 & 31 Vict. c. 142, the Act then in force. Under that section the existence of jurisdiction depends on the value of something. Whether that something be in this case the moor on which the alleged trespass took place, or the defendant's farm, or the right of common itself taken alone, is the question which has been discussed, but as to which we do not intend at present to express any opinion. The actual value of the right of common is in controversy, and we think that the plaintiff should have an opportunity of answering the affidavit as to its value now produced by the defendant. We, therefore, leave that part of the case for further discussion. But the case was argued on another point which is not affected by the controversy of fact, and which is now ripe for decision. It is said that, when the judge ordered the case to be struck out, he was functus officio; that

jurisdiction within the terms of the section. The defendant's counsel argued that the right claimed being a right of common appurtenant it formed one hereditament with the farm to which it was appurtenant, and the value of the farm with that appurtenance must be looked to as the test for the purposes of the section: but he also produced an affidavit alleging that the value of the right of common claimed taken alone was more than 20*l.* by the year, and the Court, as will be seen, thought that the plaintiff ought to have an opportunity of answering that affidavit, and consequently that the case should stand over with regard to the question of jurisdiction under the 12th section of the County Courts Act, 1867, for further consideration Therefore the argument on that point is omitted.

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there was no trial of the cause, and consequently there can be no new trial of it; and that therefore the county court judge had no jurisdiction to order a new trial. From November 10 to the end of the year the provision which regulated new trials in the county court was s. 89 of 9 & 10 Vict. c. 95, which provides that the judge shall "in every case whatever have the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable." That section has been re-embodied in the Act of 1888 in substantially the same words (1), and therefore we are not embarrassed by any difference in the two provisions. The words are emphatic: "in every case whatever" the judge is to have the power of ordering a new trial. But it is said that the provision does not apply where the judge has not pronounced judgment on the merits but has ordered the case to be struck out for want of jurisdiction. Under s. 12 of 30 & 31 Vict. c. 142, jurisdiction may depend on disputed questions of fact as to the value or amount of rent. Therefore the county court judge may have to determine questions of fact before he can determine the question of jurisdiction. But the judge may find that in determining such questions he has been misled by the evidence, or that he has come to an unsatisfactory conclusion of fact. Then why in point of principle should he not have power to direct a new trial where that is the case, when he would have such power as to any other issue of fact? I cannot conceive any reason à priori. The ground I proceed on is this. The case was put down for trial, and did come on for trial on all issues necessary to determine the question of jurisdiction, and the Act has in every case given power to direct a new trial. Therefore, though the decision here was as to the jurisdiction, and not as to the merits, I think that is one of the cases in which the county court judge could grant a new trial.

LOPES, L.J. I say nothing on the questions which arise under s. 12 of 30 & 31 Vict. c. 142, because they are postponed for further consideration. Another question is, whether the county court judge has jurisdiction to grant a new trial under s. 89 of 9 & 10 Vict. c. 95, when he has previously acted under

(1) See s. 93 of County Courts Act, 1888.

s. 14 of 30 & 31 Vict. c. 142, which gives him power to strike the case out for want of jurisdiction. To determine that question we must consider the words of s. 89 of 9 & 10 Vict. c. 95. It provides that the judge "shall also in every case whatever have the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable." The words are as general as they can be. The words "in every case," in my opinion, include the case where the county court judge has not decided on the merits, but has struck the case out for want of jurisdiction.

To determine whether he had jurisdiction it was necessary, in a case like this, to hear evidence of facts with regard to the value of the hereditaments in question. Suppose the judge has reason to believe that on the previous occasion he was misled by the evidence and that it was unreliable, or that he was mistaken in the conclusion at which he arrived, it is a strong thing to say, having regard to the very general words of the section, that the power there given of ordering a new trial does not apply in such a case. I think that this point is not tenable, and in that respect I agree with the view taken by the Court below. (1)

Judgment accordingly.

Solicitor for plaintiff: *A. Toovey, for Edmundson & Gowland.*

Solicitors for defendant: *Emmet, Son, & Stubbs, for H. Ashton Highley.*

(1) Upon the case coming on again for argument upon further affidavits with respect to the question of jurisdiction, the parties ultimately agreed, at the suggestion of the Court, that an order should be made by consent that the application for a prohibition should be withdrawn, and that a writ of certiorari should issue to remove the action into the Queen's Bench Division.

E. L.

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June 4.

[IN THE COURT OF APPEAL.]

ROGERS *v.* WHITELEY.

Practice—Garnishee Order—Attachment of Debt—Balance in Hands of Garnishee—Order XLV., *rr.* 1, 2.

The defendant acted as banker to the plaintiff and held a sum of money to his credit. A judgment in another action was obtained against the plaintiff, and all debts in the hands of the defendant were attached to answer such judgment. The amount in the hands of the defendant exceeded the amount of the judgment. The plaintiff drew cheques against the balance which were presented and dishonoured:—

Held, affirming the judgment of the Queen's Bench Division, that the defendant was not bound to honour the cheques so drawn, and that his refusal to do so gave the plaintiff no cause of action.

APPEAL from a judgment of the Queen's Bench Division.

This was an action tried before Pollock, B., in which the plaintiff claimed damages from the defendant for, amongst other things, dishonouring certain cheques drawn by the plaintiff and presented for payment to the defendant. At the trial it appeared that the defendant acted as banker, and that the plaintiff had two accounts, a deposit account and a current account, but a notice, which had expired, had been given to transfer the former to the current account. The defendant was served with a garnishee order made in an action, *Rogers* v. *Holloway*, whereby all debts due from the defendant to the plaintiff were attached to answer the sum of 6000*l.*, being the amount which Rogers had been ordered to pay to Elizabeth Holloway, the defendant in the above-mentioned action. The amount standing to the credit of the plaintiff with the defendant at that time in the two accounts was over 6800*l.* The plaintiff thereupon drew cheques on the defendant for sums less than the balance over and above the amount required to meet the 6000*l.* These cheques were dishonoured, and of this the plaintiff complained as wrongful and injurious to his credit. On this part of the plaintiff's claim the learned judge was of opinion that there was no case to go to the jury and entered a judgment for the defendant. The plaintiff applied to a Divisional Court for a new trial which was refused by Mathew and Grantham, JJ.

The plaintiff appealed.

Candy, Q.C., and *Paget*, for the plaintiff. The amount in the hands of the defendant was greatly in excess of the judgment debt, and it would be a great hardship if, in such a case, the credit of the judgment debtor could be endangered by the refusal of the garnishee to honour cheques on the balance. All that the judgment creditor requires is a security for his debt and he has no claim against the surplus, as the garnishee order does not transfer the debt to him: *Chatterton* v. *Watney*. (1) It is admitted that the form of the order is against the contention that the balance of the fund in the hands of the garnishee over the judgment debt is available to the judgment debtor, but in principle the effect is the same as the attachment of part of a debt, which can be done: Archbold's Practice, 14th ed. p. 930, citing an *Anonymous case* (2) and *Johnson* v. *Diamond*. (3)

Waddy, Q.C., and *T. Willes Chitty*, for the defendant, were not called on.

LINDLEY, L.J. (after dealing with other points raised in argument). I come now to the third point raised in this appeal. It appears that the plaintiff had two accounts with the defendant, a deposit account in which there was a large sum, over 6800*l.*, to the plaintiff's credit, and a current account in which there was about 60*l.* or 70*l.* Notice had been given to withdraw the 6800*l.* and that notice had expired, so that the plaintiff had in effect both accounts to draw on. The plaintiff drew cheques on the defendant, which would have been cashed but for the circumstances I am going to detail. There was a judgment against the plaintiff for 6000*l.* and an order attaching the debts due from the defendant to the plaintiff was issued under Order XLV., r. 1. This order was in the usual form attaching "all debts owing or accruing" from the garnishee to the judgment debtor to answer the judgment recovered against him. The order was served on the defendant and in consequence of it he took up the position that he could not safely pay away any of the money attached. No difference is suggested between the money held on the deposit

(1) 17 Ch. D. 259. (2) Godb. 195, No. 282.
(3) 25 L. T. (O.S.) 85; 11 Ex. 73.

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Lindley, L.J.

account and that held on current account. It is argued for the plaintiff that a charging order is only security for the sum mentioned in it, and that it was the duty of the defendant to retain only so much of the amount in his hands as was necessary to meet the judgment debt. On the other side it is said that though a banker may do this he is not bound to do so. Let us look at the matter on principle. The garnishee order was obtained under Order XLV., r. 1, which allows the Court or a judge to order that "all debts" owing or accruing from the garnishee to the debtor shall be attached. The form of the order follows this, and directs the attachment of "all debts." No doubt in one sense the attachment is only a security for the payment of money, but the question is what effect the order has on the person on whom it is served. It seems to me that effect cannot be given to the words of the order unless by saying that it prohibits the person affected by it from parting with the money attached so long as the order is in force. I do not say that he may not part with any surplus, but if he does so it is at his own peril.

The point does not seem to have been much before the Courts, but the judgment of Cotton, L.J., in *Chatterton* v. *Watney* (1) certainly is in accordance with our decision. It appears to me, therefore, that the defendant was justified in declining to part with any money to the plaintiff until service of notice of the discharge of the order. Any one who follows the effect of a charging order will see that otherwise very serious consequences might arise. I will give one illustration. A portion of the money in a banker's hands might be, without the knowledge of the banker, money of which the judgment debtor was trustee. That portion could not be ordered to be paid to the judgment creditor who obtained the charging order, he can only obtain payment out of the debtor's own money. But if the banker honoured cheques drawn by the judgment debtor the sum properly payable to the judgment creditor would be reduced and the banker would run the risk of being held liable for the sum the judgment creditor might lose. I think, therefore, that the defendant was not bound to honour the cheques, and that his refusal to do so lays him open to no action. The Lord Chief Justice desires me

(1) 17 Ch. D. 259.

to say that he agrees with this judgment. The appeal will be dismissed.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff: *A. P. Jackson.*
Solicitors for the defendant: *Roche & Son.*

A. M.

TANCRED AND OTHERS *v.* DELAGOA BAY AND EAST AFRICA RAILWAY CO.

June 18, 19.

Assignment of Debt—Mortgage—Charge—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption and reconveyance upon repayment to the mortgagee, is "an absolute assignment (not purporting to be by way of charge only)" within s. 25, sub-s. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66).

Burlinson v. *Hall* (12 Q. B. D. 347) followed.

National Provincial Bank v. *Harle* (6 Q. B. D. 626) disapproved.

MOTION by way of appeal from an order of a master, referred to the Court by Denman, J., at Chambers.

The action was by Sir Thomas Tancred, Messrs. Goslings & Sharpe, and Charles Wyndham Kingdon, to recover the sum of £31,109 due from the defendants to Sir Thomas Tancred under an award. The plaintiffs Messrs. Goslings & Sharpe, and the plaintiff Kingdon were severally assignees of the debt under several assignments in writing of which express notice in writing had been given to the defendants. The plaintiff Tancred had assigned the debt to the plaintiffs, Messrs. Goslings & Sharpe, by a deed of mortgage, to secure an advance of £3000 and further advances not exceeding £5000, which contained a proviso for redemption and re-assignment upon payment of all moneys due under the mortgage. Tancred had also, subject to the assignment to Messrs. Goslings & Sharpe, assigned the debt to the plaintiff Kingdon by a deed of mortgage containing like provisoes.

The defendants in their defence pleaded, with other defences, that they did not admit that the plaintiffs Messrs. Goslings & Sharpe and Kingdon were respectively assignees of the debt. A

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master in Chambers struck out the whole defence, including this plea, as being frivolous and vexatious, and upon an appeal to the judge, Denman, J., referred the matter to the Court. At the hearing in the Divisional Court it was agreed that the Court should decide whether the plaintiffs Messrs. Goslings & Sharpe were assignees within s. 25, sub-s. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and entitled to sue in their own names to recover the debt from the defendants.

R. O. B. Lane, for the defendants. The defence is not frivolous or vexatious. This assignment is not an absolute assignment within s. 25, sub-s. 6, of the Judicature Act, 1873, and the plaintiffs are not entitled to sue. The case is governed by *National Provincial Bank* v. *Harle* (1), which is precisely in point. A mortgage is in equity only a charge upon the property mortgaged, and therefore an assignment by way of mortgage does by necessary inference "purport to be by way of charge only."

Bigham, Q.C. (*H. Tindal Atkinson*, with him), for the plaintiffs, Messrs. Goslings & Sharpe. This is an absolute assignment in writing (not purporting to be by way of charge only) within s. 25, sub-s. 6, of the Act. The decision in *Burlinson* v. *Hall* (2) governs this case, and the reasons given in the judgments in that case apply. In that case it was argued that there was an implied condition for reconveyance on repayment, and the point was considered by the Court. The case of *National Provincial Bank* v. *Harle* (1) is really inconsistent with *Burlinson* v. *Hall* (2), and it is submitted that the latter case is right and ought to be followed in preference to the former. A "charge" is a very different thing from a complete assignment by way of mortgage: a charge is only an undertaking to pay out of a particular fund. The assignment in this deed is absolute in its terms, and the proviso for reconveyance does not make it any less absolute. By s. 22 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), the receipt of a mortgagee is a sufficient discharge for any money comprised in his mortgage or arising thereunder: this shews that the mortgagee is entitled to demand payment of the mortgaged money from the person liable to pay that money.

(1) 6 Q. B. D. 626. (2) 12 Q. B. D. 347.

Lane, in reply. *Burlinson* v. *Hall* (1) is distinguishable. That was clearly a case of an absolute assignment to a trustee, who was entitled to the property in order to carry out the trusts, and there could have been no right of foreclosure or redemption as in the case of a mortgage.

DENMAN, J. In this case a master at Chambers made an order striking out the whole of the defence, and the defendants appealed against that order so far as it related to the paragraph of the defence which denied the assignment to the plaintiffs Messrs. Goslings & Sharpe and C. W. Kingdon. The appeal came before me in Chambers, and I referred the matter to the Court. The parties have now agreed that we shall decide the question whether the assignment to Messrs. Goslings & Sharpe is one upon which they are entitled to sue in their own names. That depends upon whether this assignment comes within the provisions of s. 25, sub-s. 6, of the Judicature Act, 1873, which enacts that "any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor . . . . shall be and be deemed to have been effectual in law . . . . to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." The assignment in the present case clearly includes the whole of the amount due under the award for which the present action is brought.

The difficulty in the case is raised by the contention of the defendants that, according to the decision in *National Provincial Bank* v. *Harle* (2), this assignment is not an absolute assignment (not purporting to be by way of charge only) within s. 25, sub-s. 6, of the Judicature Act, 1873. There is no doubt very great difficulty in attempting to reconcile that case, which was decided by Pollock, B., on demurrer, with the case of *Burlinson* v. *Hall* (1), which was subsequently decided by Day and A. L. Smith, JJ., sitting as a Divisional Court.

(1) 12 Q. B. D. 347. (2) 6 Q. B. D. 626.

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Denman, J.

Now the document in this case does not appear to us to purport to be "by way of charge only," either expressly or by necessary inference from its provisions, within the meaning of the section; it is an absolute assignment of the debt; a document given "by way of charge" is not one which absolutely transfers the property with a condition for re-conveyance, but is a document which only gives a right to payment out of a particular fund or particular property, without transferring that fund or property.

If it is necessary for us to decide whether the cases of *National Provincial Bank* v. *Harle* (1) and *Burlinson* v. *Hall* (2) are in conflict, and I cannot see any valid distinction between them, I think that the decision in the latter case is right, and that we must follow that case. The very point raised in this case was raised, argued, and decided in *Burlinson* v. *Hall.* (2) It is true that Day, J., does, in his judgment in the latter case (3), point out what he thinks might have been the turning point in *National Provincial Bank* v. *Harle* (1), but I do not think that that makes any distinction in principle. When the decision of a single judge, whether hearing demurrers or sitting at Nisi Prius without a jury, conflicts with the decision of a Divisional Court, as in these two cases, I think that we, sitting as a Divisional Court, ought to follow the decision of another Divisional Court in preference to that of a single judge. We therefore decide that this assignment is an absolute assignment within sub-s. 6, and does not purport "to be by way of charge only," and that the proviso for re-conveyance does not prevent it from being absolute, or make it purport to be by way of charge only.

Messrs. Goslings & Sharpe, therefore, being assignees of the whole fund within the terms of sub-s. 6 of s. 25, are entitled to sue in their own names and to have judgment for the whole amount.

CHARLES, J. I am of the same opinion, and do not desire to add anything to the reasons given by my brother Denman, in which I entirely concur. I will only make this observation, that I feel the same difficulty in endeavouring to distinguish between

(1) 6 Q. B. D. 626. (2) 12 Q. B. D. 347.
(3) At page 350.

the cases of *National Provincial Bank* v. *Harle* (1) and *Burlinson* v. *Hall* (2), and that I think those cases are not reconcilable. I have no hesitation in following the later case, for the same reasons as given by my brother Denman.

Judgment for the plaintiffs Goslings & Sharp.

Solicitors for plaintiffs Goslings & Sharpe: *Woodrooffe & Burgess.*

Solicitors for defendants: *Slaughter & May.*

H. D. W.

[IN THE COURT OF APPEAL.]

March 9, 11, 12, 13; *May* 21.

VAGLIANO BROTHERS *v.* THE BANK OF ENGLAND.

Bill of Exchange—Estoppel—Banker—Forgery of Name of Payee—Payee a "fictitious or non-existing person"—Knowledge of Acceptor—Negligence—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3.

In an action by the plaintiff for a declaration that the defendants, his bankers, were not entitled to debit him with the amount of certain forged bills of exchange accepted by him, it appeared that V., a foreign correspondent of the plaintiff, was in the habit of drawing upon him, sometimes making the bills payable to the order of C. P. & Co., another foreign firm, and that a clerk in the plaintiff's employment forged the signature of V. to bills purporting to be drawn on the plaintiff by V. to the order of C. P. & Co., and resembling the genuine bills which V. was in the habit of drawing on the plaintiff, and that he placed among the plaintiff's correspondence counterfeit letters of advice with respect to these forged bills resembling the letters of advice ordinarily received from V. By these means the clerk procured the genuine acceptances of the plaintiff to the bills which he had forged. He then forged upon the bills indorsements purporting to be those of C. P. & Co., the payees named therein, and was paid by the cashiers of the defendants across the counter the amounts for which the bills were drawn. Before payment of the bills the defendants were advised by the plaintiff in the ordinary course of business that the bills were coming forward for payment:—

Held, by Cotton, Lindley, Bowen, Fry, and Lopes, L.JJ. (Lord Esher, M.R., dissenting), that the defendants were not protected by s. 7, sub-s. 3, of the Bills of Exchange Act, 1882; that C. P. & Co. were not "fictitious or non-existing" payees within the meaning of the sub-section; that "fictitious" meant fictitious to the knowledge of the party sought to be charged upon a bill; and that

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(1) 6 Q. B. D. 626. (2) 12 Q. B. D. 347.

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the defendants were not entitled to debit the plaintiffs with the amount of the forged bills paid as above mentioned:

Held, further, by the whole Court, that the plaintiff had not been guilty of negligence immediately connected with the transactions so as to disentitle him to recover.

APPEAL of the defendants from the judgment of Charles, J., at the trial without a jury.

The facts, which are fully set out in the report of the case before Charles, J. (1), appear sufficiently for the purposes of this report from the head-note.

March 9, 11, 12, 13. *Sir R. E. Webster, A.G.*, and *H. D. Greene, Q.C.* (*Arbuthnot*, with them), for the defendants. First, these were bills which the defendants were entitled to treat as payable to bearer both under s. 7, sub-s. 3, of the Bills of Exchange Act, 1882 (2), and upon the authority of decided cases. Petridi & Co. were not real payees; they were not intended by Glyka, the forging drawer, to be the payees, and they were "fictitious or non-existing persons" within the meaning of the section. "Fictitious" means fictitious with reference to the particular transaction, and it makes no difference whether the name put upon the bills as that of the drawer or of the payee is the name of a real or of a fictitious person, provided that neither the drawer nor the payee had no real existence with reference to the bill. Petridi & Co. were therefore fictitious payees for the purposes of these transactions, for they could not, nor could any other person, properly indorse the bills, and they were never intended to derive any benefit from them. It is true that by reason of his acceptance of the bills the plaintiff is estopped from denying the drawer's signature, which he was bound to know; but that estoppel has no effect in clothing with life the name of the payee which was inserted at the time of the forged drawing. The real question is whether the payee was fictitious or non-existing at the time of the drawing of the bills, not whether he was so at the time of their acceptance, for the acceptor's knowledge is not an essential element in the facts which constitute an estoppel against

(1) 22 Q. B. D. 103.

(2) By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7, sub-s. 3, "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."

him, the only knowledge which is material at all being that of the drawer when he directs the acceptor to pay a particular person whom he knows. The section therefore does not use the word "fictitious" in the sense of "fictitious to the knowledge of the acceptor," and those words must not be read into it; it deals with a payee who is fictitious in the sense of having no real existence with reference to a particular bill, and who is not a real party to it. Even before the Act the knowledge of the acceptor that the payee was a fictitious person does not seem to have been the essential or material fact in working an estoppel against him; but even if it were, the section is silent as to the acceptor's knowledge, and must be taken to have been intended to modify the then existing law. The letters of indication sent by the plaintiff to the defendants amounted to an authority to pay the holder of the bills, and when the holder cannot be the payee he must be the bearer. The defendants could never find any one who could give a good discharge for the bills otherwise than by treating them as payable to bearer.

Secondly, there was negligence on the part of the plaintiff, which was the proximate cause of the loss.

Thirdly, the plaintiff received his pass-book half-yearly, containing entries debiting the payments made for him, for which the paid bills were sent as vouchers; these bills were retained by the plaintiff and the pass-books returned by him without objection. This amounted to a settlement of account, which cannot now be re-opened, especially considering the negligence of the plaintiff with regard to the examination of these vouchers.

Sir. C. Russell, Q.C., and *Finlay, Q.C.* (*F. W. Hollams*, with them), for the plaintiff. First, Petridi & Co. were not "fictitious or non-existing persons" within the meaning of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882; they were an existing firm, and were not fictitious either as regarded the drawer or acceptor. The defendants were therefore not justified in treating these bills as payable to bearer, and the payments made by them are not protected. Apart from the statute, where a customer authorizes payment by his banker of his acceptances, the bank is justified as against him in paying the person who by the law merchant can give a valid discharge. Primâ facie the authority of the

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banker is to pay only according to the tenor of the bill, that is, to the named payee or his order; but the banker may shew that, though there is a named payee, yet under the circumstances that payee was fictitious or non-existing in the sense that the acceptor did not intend to restrict payment to that payee or his order only. In the present case there is nothing to shew that the plaintiff did not intend so to restrict payment of the bills, and the facts shew that Petridi, who was a real person, was a real payee in the sense of being a person whom the acceptor intended as the person to whom or to whose order payment was to be made at maturity of the bills. The cases of *Gibson* v. *Minet* (1) and *Gibson* v. *Hunter* (2) are conclusive as to the law before the Act of 1882, and shew that at that time the payee must have been fictitious to the acceptor's knowledge before a bill could be treated as payable to bearer, and through *Cooper* v. *Meyer* (3), and all the other cases decided before the Act, runs the suggestion as to what was the knowledge, or ought to be presumed to be the knowledge, of the acceptor. These decisions rest upon the ground that if an acceptor has put his name to a bill, knowing that there is no such person as the payee, an indorsee and holder might be in a difficulty as to proving the indorsement; and the acceptor therefore is not allowed to take advantage of his own misconduct, and the bill must in such a case be treated as payable to bearer. The statute must be construed with reference to the law in force at the date of its passing, and s. 7, sub-s. 3, is merely codifying and has effected no alteration in the law.

Secondly, there was no negligence on the part of the plaintiff which proximately caused the loss; and in any event the negligence of the defendants in paying bills of such large amounts across the counter was so material in contributing to the success of Glyka's frauds as to prevent them from relying upon the defence of negligence of the plaintiff.

Thirdly, the receipt and return of the pass-book cannot be treated as a settlement of account or as a ratification of the payments made by the defendants; nor did the letters of indication amount to an authorization of such payments.

(1) 1 H Bl. 569. (2) 2 H. Bl 187, 288.
(3) 10 B & C. 468.

Sir R. E. Webster, A.G., in reply.

[The following cases and authorities were cited in the course of the arguments:—*Beeman* v. *Duck* (1); *Gibson* v. *Minet* (2); *Phillips* v. *Im Thurn* (3); *Cooper* v. *Meyer* (4); *Mead* v. *Young* (5); *Robarts* v. *Tucker* (6); *Stone* v. *Freeland* (7); *London and South Western Bank* v. *Wentworth* (8); *Bennett* v. *Farnell* (9); *Coggill* v. *American Exchange Bank* (10); *Lane* v. *Krekle* (11); *Merchants of the Staple of England* v. *Bank of England* (12); *Bank of Ireland* v. *Trustees of Evans' Charities* (13); *Ireland* v. *Livingston* (14); *Whitaker* v. *Bank of England* (15); *Skyring* v. *Greenwood* (16); *Woods* v. *Thiedemann* (17); *Young* v. *Grote* (18); *Arnold* v. *Cheque Bank* (19); *Lickbarrow* v. *Mason* (20); *Gibson* v. *Hunter* (21); *Ashpitel* v. *Bryan* (22); *Arthur* v. *Bokenham* (23); Maxwell on Statutes, p. 95.]

Cur. adv. vult.

May 21. LORD ESHER, M.R. It is unnecessary to recapitulate the facts of this case. It seems to me that its determination must depend upon what is the interpretation and application of the Bills of Exchange Act, 1882. In order to arrive at the true interpretation of that Act, I think it is necessary to consider not merely what was the law at the time of the passing of that Act, but what were the principles on which the different cases which declared the law were founded.

It is clear to me that the document in question in this case is not really in law, according to the law merchant, a bill of exchange at all. "A bill of exchange is an unconditional written order from A. to B. directing B. to pay to C. a sum

(1) 11 M. & W. 251.
(2) 1 H. Bl. 569.
(3) Law Rep. 1 C. P. 463; 18 C. B. (N.S.) 400, 694.
(4) 10 B. & C. 468.
(5) 4 T. R. 28.
(6) 16 Q. B. 560.
(7) 1 H. Bl. 317, n.
(8) 5 Ex. D. 96.
(9) 1 Camp. 130, 180 c.
(10) 1 New York Rep. 113.
(11) 22 Iowa Rep. 399.
(12) 21 Q. B. D. 160.
(13) 5 H. L. C. 389.
(14) Law Rep. 5 H. L. 395.
(15) 1 C. M. & R. 744.
(16) 4 B. & C. 281.
(17) 1 H. & C. 478.
(18) 4 Bing. 253.
(19) 1 C. P. D. 578.
(20) 2 T. R. 63; 1 Sm. L. C. 5th Ed. 681.
(21) 2 H. Bl. 187, 288.
(22) 5 B. & S. 723.
(23) 11 Mod. 148.

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certain of money therein named:" Byles on Bills. "A bill of exchange," says the codifying Act which declares what was and is the law, "is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer:" Part 2, s. 3. "There must be," says Mr. Chalmers, in a very able and useful book, "in point of form three parties to a bill of exchange, (1) the party who gives the order, called the drawer, (2) the party on whom the order is given, called the drawee, (3) the party in whose favour the order is given, called the payee." I agree to this, except to the phrase "in point of form." I think there must be three real parties, although the same party may be the drawer and the payee. But in the present case there is no real drawer. The man who pretended or purported to be the drawer was a forger. The law merchant never recognised a forger of another man's name as a real mercantile drawer. There is in this case no real payee; the forging drawer cannot be recognised as the payee. The pretended payee is Petridi & Co.; but the pretended bill was not drawn in favour of Petridi & Co.; it was not intended that the pretended bill should ever be in the possession or under the control of Petridi & Co. The payee of a bill of exchange is a person in whose favour it is drawn, that is to say, the person to whom it is to be handed first in order that he may deal with it. In order to make a document a bill of exchange, there must be a real payee; Petridi & Co. were not the real payee. If they had found the pretended bill, they could not honestly have required payment of it, or have indorsed it; they would have known that it was not really drawn in their favour. The document in question had no real payee, and therefore on that ground also was not a bill of exchange. It was not even a contract of any kind, or evidence of any contract. It was not a contract or evidence of a contract between the forging drawer and the acceptor. The forger could not have sued upon it or by means of it. It was not a contract or evidence of a contract between Vucina & Co. and the acceptor. It is not at law an available instrument at all, unless it can be treated as a bill of exchange. But such a document can, between certain persons,

under certain circumstances, be treated as a bill of exchange by ordinary rules of law, although it is not really a bill of exchange. It can be so treated between persons, one of whom is by the legal rules of estoppel prevented from denying to the other that it is a bill of exchange. If the estoppel is constituted, then to the extent of the estoppel, but no further, the document as between those persons must be treated by virtue of the rules of the general law, not of the law merchant, as if it were really a bill of exchange. The estoppel which has to be dealt with in the present case is one by which an acceptor is estopped. Therefore we may pass by other estoppels. The acceptor is estopped from denying the handwriting of the drawer. That has been decided. On what principle does the decision rest? By the custom of merchants, which has been so proved as a fact that it has, like so many other mercantile customs, come to be accepted (without further evidence) as a fact by the Court, an acceptor is bound to know the handwriting of the drawer. The custom is rather more convenient than just. The present case is an instance in which the forgery or imitation is so perfect as to defy the most careful examination. But the custom has made the law. That being so, it must be negligence in the acceptor if he mistakes that which he is bound to know. It is, further, part of the custom of merchants that the acceptor by accepting represents to all into whose hands the document may bonâ fide come that the person purporting to be the drawer is the real drawer. If, then, such a person gives value for the bill relying upon such representation, he would be injured by such representation unless the acceptor were estopped. But where one negligently represents that to be true which is in fact false, in order that another may act upon such representation as if it were true, and the other does act upon it believing it to be true, and acts in such a way that, it being untrue, he would suffer loss or damage if the one making the representation were allowed to rely on the untruthfulness, the one making the representation is by the law estopped from averring the untruthfulness as against the other. This is a general rule of the law of estoppel. The facts being ascertained, the law declares the estoppel. And when once the estoppel is effectual, the transaction between the two parties is to be treated

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as it would be if the representation had been true. In the given case the transaction is as between the bonâ fide indorsee for value and the acceptor, though not as between any other persons, to be treated as if the person purporting to be the drawer was in truth the drawer. If there is no other defect in the supposed bill, the acceptor is in such case liable to pay to the indorsee the amount of the bill.

Let us next deal with the case of an acceptor accepting a bill drawn upon him, apparently in favour of a third person or that person's order, but in truth not intended to be in that third person's favour, that is to say, to be handed to him to be used by him at all. What, if anything, will in such case constitute an estoppel according to the law of estoppel against the acceptor? No custom of merchants exists to the effect that among merchants the acceptor of a bill of exchange is bound to know the person named in the bill as payee. The drawer is supposed to have the right to direct the drawee to pay any person whom the drawer may name in the bill as the payee. In hundreds of cases it must be impossible that the drawee should know the payee, yet the drawee cannot refuse to accept because he does not know the payee. There is no custom of merchants that the acceptor is taken to represent anything about the payee. The case, therefore, is not within the rule of estoppel above mentioned. But if the acceptor of a bill, drawn apparently in favour of a third person or his order, knows at the time of accepting that the bill is not intended to be in that third person's favour, that is to say, that it is not to be handed to him to be used by him at all, the acceptor must further know that the bill cannot be used by means of that third person's honest indorsement, but that if it be used it must be indorsed, either with the dishonest connivance of the pretended payee, or by some other than that person using his name without his authority. Any person taking that bill upon the faith of that indorsement would be taking it on a false and ineffective indorsement. If he gave value for it, he would suffer loss, unless the parties who had led him into that position were estopped. But if one knowingly and fraudulently leads another to do that which the first intends him to do, and which the second would not do if he knew

of the fraud, the first is estopped in favour of the second. That is a general rule of the law of estoppel. In the supposed case, therefore, upon proof of the fraudulent intent and of the indorsee having acted upon it and having given value, the law would in his favour estop both the drawer and the acceptor. As between them and him, though not as between any other parties, the bill would be treated as a bill of exchange, so far as the necessity of there being a true and real payee and the necessary consequences thereof are concerned. The similar application of the legal rules of estoppel to the case of an estoppel as against an acceptor in respect of indorsements on a bill accepted by him will explain the cases in which an acceptor has been held not to have been estopped from disputing an illegal indorsement. It seems to me useless to name the cases which have been cited. They all determine that the peculiar conditions applied to bills of exchange by the law merchant are only applied to regular and honest bills of exchange; but that documents resembling bills of exchange, and dishonestly purporting to be bills of exchange, though they are not really bills of exchange, may have to be treated as bills of exchange, subject to the law merchant rules of bills of exchange, if circumstances are proved to exist between certain parties sufficient according to general law to prevent one of them from denying to the other that the document in certain particulars is a regular bill of exchange. In this case the document is not a bill of exchange. It has no real drawer and no real payee. Neither the forger nor Vucina & Co. is a real drawer; Petridi & Co. is not a real payee. As to the defect of the drawer, the acceptor would be estopped as against the bonâ fide indorsee for value. If that had been the only fault in the bill, the acceptor would have been bound to pay it. But there is the defect of the payee and of the indorsement which purports to be the indorsement of the payee. The acceptor in this case is not by the general law estopped as to those defects, because it is not proved that when he accepted he knew that the payee was not a real payee. Unless, therefore, the law is altered by the Bills of Exchange Act, 1882, the plaintiff in this case, the acceptor of the supposed bills paid by the bank, would not have been bound to pay either the bearer or any bonâ fide

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indorsee for value. The question, therefore, is whether the plaintiff was bound by virtue of the statute to pay the bearer of these documents.

That depends upon what is the true construction of the statute. And all the statement of the law and of the reasons of the law which I have thus made was made in order to give a clue to the true construction of the statute. The Act is an Act dealing with bills of exchange. It does not primâ facie deal with documents which are not bills of exchange. These documents are not bills of exchange, therefore primâ facie these documents are not dealt with by the Act. But as between parties, where one is estopped from denying to the other that the document is a bill of exchange, the document as between them must be treated as a bill of exchange. As between them, therefore, it must be treated as being within the Act. But the question of whether there is or is not an estoppel must be decided before it can be determined whether the document is or is not to be treated as within the Act. That question is not, unless the Act enacts otherwise, to be decided by or under the Act, but wholly outside the Act, and before the Act can be made available. It is said that s. 7, sub-s. 3, applies to a case not otherwise within the Act, and makes the acceptor in this case liable to pay the bill to the bearer. I am of opinion that if the bill can be brought within the statute at all the terms of this sub-s. 3 describe it and govern it. The payee named on the face of the bill is, in my opinion, a fictitious payee. Petridi & Co. is not the real payee. If he were, he would be entitled to have possession of the bill and entitled to indorse it. He is the pretended payee. He who in fact drew the bill has pretended on the face of the bill that Petridi & Co. is the payee; but he intended that Petridi & Co. should not be the payee. He feigned that Petridi & Co. was the payee when he was not. To "feign" is an equivalent for to pretend. Then, using the adjective as applicable to the thing feigned, the payee in this case is a fictitious payee. The antithesis is between a real and a feigned or fictitious payee. That is the business meaning of fictitious, even though the pure literary meaning were otherwise, though I do not think it is. I decline to determine the literary question whether Mary Queen

of Scots in Sir Walter Scott's novel is a real and Roland Græme a fictitious person. The rights and liabilities of merchants are not to depend upon any such analogies. Moreover, if "fictitious" in the sub-section does not apply to the name of an existing person who is not really intended to be the payee, I can see no distinction between fictitious and non-existing in the sub-section. But still the question remains whether this sub-section is strong enough to bring into itself a document which is neither in law nor by estoppel a bill at all. It is to be observed that the sub-section speaks of a "payee" as if there were a payee, and of "the bill" as if there were a bill. But there is neither in this case. And it does not say that the document *shall be* a bill and payable to bearer, nor that the bill *shall be* payable to bearer; but only that it *may be treated* as payable to bearer. I was for a long time of opinion that this sub-section must be construed as applying to and determining the difference of opinion between Eyre, C.B., as expressed by him in *Gibson* v. *Minet* (1), and the other judges, as to whether, when the estoppel is constituted, the bill is to be treated as payable to bearer. I thought that it determined that in such case it is, and that that was all that it determined. I thought it left the question of estoppel to be first determined according to the common law as a question of fact; and that if that question was determined by evidence against the acceptor, the bill was as against him to be treated as payable to bearer. That, however, leaves the effect of the section to be so utterly, even ludicrously, insignificant, that I cannot in the end conclude that such was the intention of the legislature. I think that the section must be construed according to the ordinary grammatical construction; that those who passed it must be taken to have intentionally omitted from the former well-known formula of law the words "to the knowledge of the acceptor," words which are used in all the great judgments on the point; and that therefore by virtue of the Bills of Exchange Act this bill was as against the acceptor payable by him to a bonâ fide indorsee for value as a bill payable to bearer. The statute answers the doubt expressed in rule 3 on p. 166 of Mr. Chalmers' book (2)

(1) 1 H. Bl. at p. 612.
(2) Chalmers on Bills of Exchange, p. 166, 1st Ed.; p. 174, 3rd Ed.

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in a way in which the law, as I have said, without the statute would not have answered it. It makes the acceptor of a bill of exchange answer for the validity of, at all events, all that appears on the face of the bill when he accepts it. It makes him answerable for the validity of the drawer's signature, and for the existence and capacity of the payee named by the drawer. It is a result which seems to me to be a business-like, and therefore a probable, result to be intended. What is the consequence as between the plaintiff and the bank? That question depends upon what is the contract between the plaintiff and the bank. I have no doubt myself that this bank, or any bank, might make a contract with their customer in terms which would leave the bank entirely safe if it paid such a document as this solely upon the handwriting of its customer signing an apparent bill of exchange as acceptor, whether my construction of the statute be right or wrong. If it had not been for the case of *Robarts* v. *Tucker* (1), I should have thought that a bank paying on its customer's real signature, might well charge him with such a payment. I think that the case of *Robarts* v. *Tucker* (1) was, to say the least, a harsh decision. I doubt whether the Court was entitled to draw the implication which it did. But the case cannot be overruled. The contract between a bank and its customer in such a matter, if not otherwise distinctly expressed, is that the bank can only charge its customer if it pays upon an acceptance by him of a bill of exchange to a person entitled by law to claim payment from him as the acceptor of a bill of exchange. If the document on which the bank pays is not a bill of exchange either by law or by estoppel against the acceptor as between him and the person presenting the bill for payment to the bank, there is no contract between the bank and its customer authorizing the bank to charge him with the payment. Here the contract between the plaintiff and the bank is not shewn to be other than the ordinary contract. If it were not for the statute I should have said that the bank could not have set the payments made by it against the acceptor, its customer. But by virtue of the statute I think it can. And, therefore, after the most anxious consideration that I ever gave to a case, I am of opinion, for the reasons I have given, that the

(1) 16 Q. B. 560.

defendants are entitled to judgment and that the appeal should be allowed.

As to the case of negligence relied upon by the bank, I think it right to say that I can see but one act of negligence on the part of the plaintiff in his business. I think there was not a due supervision of the clerk. But I think that negligence was too remote from the loss suffered by the bank to enable the bank to rely on it. I think there was want of care in the bank in paying so many and such bills across the counter, as it is called; but I give no opinion whether such want of care would have disabled them from charging the plaintiff if his negligence had been a proximate cause of the bank's loss.

COTTON, L.J., read the following judgment of the majority of the Court, which had been prepared by

BOWEN, L.J. The facts of this case have been so carefully set forth by the learned judge in the Court below that it is not necessary to re-state them. The first question of law which arises is as to the exact duty which the bank undertook in respect of the documents presented to them for payment. This matter has been decided many years ago in the case of *Robarts* v. *Tucker* (1), and the business relations between bankers and their customers have been for many years regulated by the principles there laid down. The acceptance of a bill of exchange payable at a banker's is tantamount to an order to the banker to pay the bill to the person who, according to the law merchant, is capable of giving a good discharge for it. If the bill is payable to order, it is an authority to pay the bill to any person who becomes holder by a genuine indorsement. If the bill is originally payable to bearer it is an authority to pay the bill to the person who is the holder. Whether the documents presented in the present case to the bank have ever, in the mercantile sense of the term, become bills of exchange at all may perhaps be open to question. They have never been in the hands of any bonâ fide holder, having been stolen from the acceptor before they got into circulation by the thief who actually cashed them at the bank. But the letters of indication addressed to the bank by the plaintiffs

(1) 16 Q B. 560.

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treated the apparent bills by special reference as acceptances in circulation, and directed them to be paid by the bank, and we may assume, for the purposes of our judgment, accordingly, that the bank would be justified in dealing with them as if they were actual bills, and that the duty of the bank in respect of them would be regulated by the principles laid down in *Robarts* v. *Tucker*. (1) If they are to be treated as bills payable to order, there was nobody who had become their holder by genuine indorsement. The bank can only justify the payment that has been made by shewing that the documents were to be considered in the light of bills originally payable to bearer, in which case, as *Robarts* v. *Tucker* (1) indicates, the bank would be authorized to pay the amount to the person who was the holder. In order to bring the bills, as we shall call them for the purposes of this judgment, within this catagory of bills originally payable to bearer, the bank relied upon the recent statute of 1882 (45 & 46 Vict. c. 61), s. 7, sub-s. 3, which enacts with reference to bills of exchange, that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer," and the counsel for the bank contended before us that the payees named C. Petridi & Co. were fictitious payees within the meaning of the section. A real and existing firm of that name were, in fact, carrying on business at Constantinople, and had been on previous occasions payees of genuine bills drawn by Vucina upon Vagliano Brothers. It was unquestionably intended by Glyka that the acceptor should believe, and the acceptor in each case did believe, that the payees indicated were the C. Petridi & Co. in question, but it was urged by the appellants' counsel that as Glyka, the forger, intended to forge C. Petridi & Co.'s names, and never meant that they should have anything to do with the bills, the payees were fictitious; that it was immaterial in what sense the acceptor understood the introduction of their names, and that from the first these bills were payable to bearer within the true meaning of the section. The result of such an interpretation would be that an acceptor, who is certainly interested in knowing to whom he is properly to pay the money, in order that he may

(1) 16 Q B 560.

not pay it to the wrong person, would be compellable in cases of forgery like the present to remain in absolute ignorance on this vital point. We were told by the counsel for the bank that the acceptor of a bill has no interest in the choice by the drawer of the payee. That may be so. But the acceptor is deeply interested in having it made clear upon the bill who the payee is to be, and it is contrary to the very essence of a bill of exchange that any uncertainty should be left on the matter. Before accepting such a construction of the sub-section it is desirable to state with precision what was the previous commercial law upon the subject. The law merchant seems to have been clear, and to have been based throughout on the principle of the law of estoppel, which in its turn is conformable with reason and business principles. An acceptance after sight of a bill is an admission by the acceptor of the genuineness of the signature of the drawer—an admission, that is to say, that the signature is either in his handwriting or placed to the draft by somebody who has authority to sign for him, and the acceptance is also a representation by the acceptor in favour of all bonâ fide holders that, so far as he knows, the payee exists and is a person of a capacity to indorse: *Drayton* v. *Dale* (1) and *Mead* v. *Young* (2). The genuineness of the indorsement of the payee was, however, a matter as to which, except in one special instance, no estoppel prevailed. The one exception to the rule was the case described as follows in Story on Bills of Exchange, ss. 56, 200. Sect. 56: "A bill made payable to a fictitious person or his order and indorsed in the name of such fictitious payee in favour of a bonâ fide holder without notice of the fiction, will be deemed payable to the bearer and may be declared on as such against all the parties who knew the fictitious character of the transaction." Sect. 200: "If the bill is payable to a fictitious person or order (as has been sometimes, although rarely, done), then, as against all the persons who are parties thereto and aware of the fiction (as, for example, against the drawer, indorser, or acceptor), it will be deemed a bill payable to the bearer in favour of a bonâ fide holder without notice of the fiction." This exceptional rule in the case of fictitious bills is based, as has been stated, on a special

(1) 2 B. & C. 293. (2) 4 T. R. 28.

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application to a particular case of the principle of estoppel, which plays so important a part in the law merchant. Its history so far as English law books are concerned, dates back to a century ago, and is set out in a note to *Bennett* v. *Farnell.* (1) In the first case which bears on the subject—*Tatlock* v. *Harris* (2)—at the time the bill was drawn there was no such person in existence as the payee, a fact which was notorious to all the parties in the transaction and particularly to the acceptor. It was suggested by the Court in argument that if a bill were made payable to the Pump at Aldgate or order it might be recovered on as in effect a bill to bearer. And in *Vere* v. *Lewis* (3), a case decided upon the same day, the Court intimated an opinion that a similar bill, drawn and accepted under similar circumstances to those in *Tatlock* v. *Harris* (2), might be so treated. In *Gibson* v. *Minet* (4) the same point was distinctly raised, subject to this qualification—that the indorsement by the fictitious payee was there made before acceptance and was itself known not to be genuine by the acceptor at the time of such acceptance. The Queen's Bench held that the bill was in effect payable to bearer, and the decision was confirmed by the House of Lords. A perusal of the opinions of the Judges in that case shews that they considered the exception in the case of such fictitious bills to be in reality nothing but a further application of the doctrine of estoppel in a case in which knowledge of the fiction by the acceptor gave rise to an estoppel of the kind. In *Gibson* v. *Hunter* (5) the House of Lords appears to have expressly decided that it was only where the fictitious character of the bill was known to the acceptor at the time of acceptance that the bill could be treated against the acceptor as a bill payable to bearer. The question arose on a demurrer to evidence, and it is to be observed that the fourth count alleged merely that the supposed payee was fictitious without alleging that the acceptor knew of this. It was proved in evidence that no such person as the payee existed, and that the name of the payee indorsed on the instrument was not in the handwriting of any person of that name, but on the evidence it

(1) 1 Camp. 130.
(2) 3 T. R. 174.
(3) 3 T. R. 182.
(4) 1 H. Bl. 569.
(5) 2 H. Bl. 187, 288.

was still left in doubt whether the acceptor was privy to the fact of the payee being fictitious. The judges advised the House, and the House of Lords decided in conformity with their advice, that upon this record no judgment could be given, and a venire de novo was awarded. If the knowledge of the acceptor had been immaterial, judgment ought to have been given on the record on the fourth count. The case, however, went down again to be tried and again came before the House of Lords on a demurrer to evidence, and it was finally held that in an action on a bill of this sort against the acceptor, to shew that he was aware that the payee was fictitious, evidence was admissible of the circumstances under which he had paid other bills to fictitious persons. Not only, therefore, is the first case of *Gibson* v. *Hunter* (1) an authority to the effect that the exceptional doctrine under discussion only applies where the acceptor knows that the payee of the bill which he is accepting is fictitious, but the whole of the subsequent litigation becomes unintelligible upon any other hypothesis. In the case of *Bennett* v. *Farnell* (2) a bill of exchange made payable to a fictitious person was sued upon as a bill to bearer, but there was no evidence that the acceptor knew of the fiction. Lord Ellenborough nonsuited the plaintiff. In Lord Campbell's head-note to the case the effect of the decision is thus stated:—"A bill of exchange made payable to a fictitious person or his order is neither in effect payable to the order of the drawer nor to bearer." But at page 180 c of the addenda, there is this further note by Lord Campbell: "In *Bennett* v. *Farnell* (2) the doctrine supposed to have been held that 'a bill of exchange made payable to a fictitious person, or his order, is neither in effect payable to the order of the drawer nor to bearer' must be taken with this qualification—unless it can be shewn that the circumstance of the payee being a fictitious person was known to the acceptor. A new trial was refused in this case, because no such evidence had been offered at Nisi Prius. Lord Ellenborough said he conceived himself bound by *Gibson* v. *Minet* (3) and the other cases upon this subject which had been carried to the House of Lords (though by no means disposed to give them any extension), and that if it

(1) 2 H. Bl. 187, 288. (2) 1 Camp. 130, 180 c. (3) 1 H. Bl. 569.

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had appeared that the defendant knew George Abney, the payee, to be a fictitious person he should have directed the jury to find for the plaintiff." The case of *Cooper* v. *Meyer* (1) is scarcely in point. It decides merely that where a bill is drawn in the name of a fictitious person payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signs as drawer. The case would only have been relevant if the bills in the present case, instead of being made payable to the order of Petridi & Co., had been made payable to the order of Vucina (see *Beeman* v. *Duck*. (2)) In *Phillips* v. *Im Thurn* (3) the question was one between the holder and the acceptor supra protest for the honour of the drawer; and the matter we have to decide did not arise. The above authorities relate to the case of fictitious persons. In *Ashpitel* v. *Bryan* (4) a similar question occurred where a bill by arrangement between the acceptor and the drawer was drawn and indorsed in the name of a dead man. A similar application was there made of the same principle of estoppel. Probably it was with reference to this case that the term "non-existing" is introduced into the sub-section which we have to interpret. Down, therefore, to the date of the passing of the recent statute the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer was based uniformly upon the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character or of the non-existence of the supposed payee. The principle that lies at the root of the exception is that a reasonable effect must be given in favour of bonâ fide holders to the act of acceptance, and that, where it appears that although there was a named payee he was so completely fictitious or non-existing that the acceptor could not have intended to restrict payment to such payee or to his order, the acceptor, who must be taken to have intended that his acceptance should have some commercial validity, was estopped from saying that the bill was not a bill payable to bearer If

(1) 10 B. & C. 468.
(2) 11 M. & W. 251.
(3) Law Rep. 1 C. P. 463; 18 C. B. (N.S.) 694.
(4) 5 B. & S. 723.

the exception is to be extended beyond this it will rest upon no principle at all, and this strange result would follow—that where for purposes of fraud a payee's name is introduced (whose signature it is intended to forge) the acceptor, though innocent and ignorant, will be bound to pay, and his bankers will be justified in paying without any indorsement at all. The acceptor in such cases will be a helpless victim. Ignorant himself of the fraud, believing from first to last that he has accepted a bill payable only to a particular payee, or to his order, he will be held in law nevertheless to have accepted a bill payable to bearer. Before holding that s. 7, sub-s. 3, of the recent statute was intended, not merely to codify existing law, but to alter it and to introduce so remarkable and unintelligible a change, we might well be tempted to pause. Sect. 7 is a section dealing with the form and interpretation of bills and drafts, and the apparent object of sub-s. 3 is to indicate the manner in which bills or drafts are to be interpreted and dealt with where the bill or draft is drawn in favour either of a creature of the imagination or a person who is dead. By the words, "The bill may be treated as payable to bearer" must surely be understood "treated as against those who are to be made liable for the bill." The word "fictitious" must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term fictitious may be satisfied if it is fictitious as regards himself—or, in other words, fictitious to his knowledge. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, fictitious must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle. But, in truth, whatever be the interpretation of the section, "fictitious" cannot mean what is contended for by the counsel for the appellants. Petridi & Co. were old customers of Vucina, carrying on business at Constantinople, whose existence was known to the acceptor, and whose name was fraudulently introduced into the bill by Glyka, because it was the name of a real and known firm. In effect the representation made to the acceptor on the face of a draft drawn

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under such circumstances and read by their light was that the payee was not a fictitious person. It is said that Glyka did not intend the firm of Petridi & Co. to be payees. It is perfectly true that he did not intend them to receive the money, because he intended to forge their names, and by means of such forgery to take the money himself. He meant that they were not to be paid. But it was the very essence of his criminal device that everybody who saw the draft should be led to think that a real firm—Petridi & Co., of Constantinople—were the persons to whom the money was to be paid. A real and historical person does not become fictitious by being put into a work of fiction. Mary Queen of Scots is not a fictitious person because she figures in "The Abbot." Petridi & Co., of Constantinople, did not cease to be real persons because Glyka meant to suggest falsely that they were to be the payees and meant himself to forge their names. According to the ordinary sense of the English language, the payees of these bills were not fictitious, but real persons from first to last, and to construe the sub-section otherwise would be to render it the source of needless disorder and confusion in business transactions. The instruments in question were not, therefore, payable to bearer, and the bank having paid upon forged indorsements must, in the absence of any other ground of defence, take the consequences. It is, however, contended on their behalf that the letters of indication justified them in paying to any person who appeared to be a bonâ fide holder of the bills. We cannot put any such construction upon the letters of indication. They intimated, no doubt, that the documents in question were acceptances of Vagliano Brothers then in circulation, or which at the date of maturity would have become so, but they gave no authority to pay except according to the apparent tenour of the bills. The responsibility of verifying the indorsements remained, therefore, with the bank. In the case of a genuine bill the bank would have had to bear this responsibility. There was nothing in the letters of indication to relieve them from it here.

On the question of negligence we agree with Charles, J. There was no evidence of negligence on the part of the plaintiff which so directly caused the frauds in question in this

action as to prevent the plaintiff from succeeding in his claim. There was, we think, negligence on his part in leaving so much to a clerk in Glyka's position without any effective supervision or control over his proceedings. But this was not the proximate cause of the loss which has been incurred, and therefore cannot be relied on as a defence against the claim of the plaintiff, even if there were no negligence on the part of the bank. But the officers of the bank paid the bills across the counter, and it was proved that the usual course of business was for a banker not to pay bills of so large an amount except through a banker, and the officials of the bank neglected this precaution and paid the bills over the counter to a man whom they did not know. This, in our opinion, was negligence on the part of the bank, which materially contributed to the frauds in question being successfully carried out by Glyka. This, we think, would prevent the bank from effectually relying on the defence of negligence of the plaintiff. There is another point to be considered. The plaintiff from time to time received from the bank his pass-book, with entries debiting the payments made, for which the bank sent the bills as vouchers, which were retained by the plaintiff when he returned without objection the pass-books. It was contended that this was a settlement of account between him and the bank, and that he had been guilty of such negligence with respect to the examination of the vouchers as would have prevented him from being relieved from this settlement of account. But there was no evidence to shew what, as between a customer and his banker, is the implied contract as to the settlement of account by such a dealing with the pass-book, or that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of his duty to the bank or negligence on his part. The appeal, therefore, must, in our opinion, be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Hollams, Son, Coward, & Hawksley.*
Solicitors for defendants: *Freshfields & Williams.*

W. J. B.

1889
May 29

HORNE *v.* POUNTAIN.

*Lunatic—Charging Order on Fund—Fund in Court—Judgment Debt—*1 & 2 *Vict. c.* 110, *s.* 14; 3 & 4 *Vict. c.* 82, *s.* 1.

By 1 & 2 Vict. c. 110, s. 14, "if any person against whom any judgment shall have been entered up" in a superior court "shall have any Government stock, funds," &c., "standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior Courts on the application of any judgment creditor to order that such stock, funds," &c., "or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor."

By 3 & 4 Vict. c. 82, the aforesaid provisions are extended, and by s. 1 it is enacted that "whenever any such judgment debtor shall have any interest in any such stock, funds," &c. "standing in the name of the Accountant-General of the Court of Chancery . . . . it shall be lawful for such judge to make any order as to such stock, funds," &c. "in the same way as if the same had been standing in the name of a trustee of such judgment debtor . . . ."

On an application at chambers, under the above Acts, by the judgment creditor of a debtor found lunatic by inquisition, for a charging order on funds standing in the books of the Paymaster-General of the Chancery Division to the credit of the debtor, who was described in such books as "a person of unsound mind," the learned judge ordered that "so much of the defendant's interest in the fund so standing as aforesaid should stand charged with the payment of the . . . . amount due on the judgment as the Lords Justices sitting in Lunacy might deem applicable to payment of the judgment debt":—

Held, that the Acts gave the judge no power to make an order providing that the amount to be charged should be determined by the Lords Justices, and that the creditor was entitled to an unconditional order on a specified amount of the fund.

APPEAL from a charging order under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82.

It appeared that John Thomas Pountain was, on June 25, 1888, found lunatic by inquisition, and under an order of the Lords Justices, sitting in Lunacy, on June 29, 1888, committees were appointed. On January 30, 1889, the plaintiff recovered in an action against the lunatic judgment for 51*l.* 14*s.* 6*d.* and 9*l.* 18*s.* costs. On March 1, 1889, there was standing in the books of the Paymaster-General of the Chancery Division of the High Court of Justice to the "ledger credit of John Thomas Pountain, a person of unsound mind," New Consols 3204*l.* 2*s.* 8*d.*

The plaintiff applied to Mathew, J., at chambers for a charging order on this fund, and the learned judge ordered that "so much of the defendant's interest in the fund so standing in the books of the Paymaster-General as aforesaid stand charged with the payment of the above mentioned amount due on the said judgment as the Lords Justices sitting in Lunacy may deem applicable to payment of the said judgment debt. Costs to be in the discretion of the Lords Justices."

The lunatic was in an asylum, the cost of his maintenance being from 250*l.* to 300*l.* a year. He had numerous other creditors. The fund was the only fund available for his support.

Hextall, for the plaintiff. The judgment creditor is entitled to an unconditional charging order under 1 & 2 Vict. c. 110, s. 14, extended by 3 & 4 Vict. c. 82, s. 1, to "the interest of any judgment debtor in stock standing in the name of the Accountant-General of the Court of Chancery." There is no authority for the limitation of the order to so much of the defendant's interest in the fund as the Lords Justices in Lunacy may deem applicable. The learned judge at chambers should have exercised his own discretion as to the part to be charged.

Swinfen Eady, for the defendant and his committee. The statutory power to charge a fund in Chancery does not apply to this fund, which stands in the books of the Paymaster-General "to the ledger credit of John Thomas Pountain, a person of unsound mind," and is therefore a fund in lunacy. Moreover, by the proviso in 3 & 4 Vict. c. 82, s. 1, no charging order under the Act "shall have any greater effect than if such debtor had charged such stock." Here the debtor was a lunatic at the date of the order, and so the Act does not apply. Secondly, if the learned judge had power to make the order, then inasmuch as it can only be enforced by the Lords Justices sitting in Lunacy, it should be such as they would approve; and in managing the estates of lunatics the Court will have regard to the maintenance and comfort of the lunatic in preference to the claims of his creditors, although the estate be insolvent: *In re Pink.* (1) In that case, Lindley, L.J., said: "The practice of

(1) 23 Ch. D. 577.

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the Court for the last 150 years has been to protect the lunatic, and to do what is most for the benefit of the lunatic—of course having regard to the interest of the creditors as far as possible." The distinction between property which can be taken in execution and a fund in court has been recognised: *Ex parte Dikes.* (1) The fund is not amenable to the Court of Chancery but only to the jurisdiction of the Lords Justices sitting in Lunacy. The distinction is drawn in *Sherwood* v. *Sanderson.* (2) The Chancery Division could make an order, but the Paymaster-General would not act on it. In *Ex parte Hastings* (3) a petition was presented by the committee of a lunatic, a beneficed clergyman, praying that his debts might be paid out of the fund of 5000*l.* in the bank, upon the suggestion that the creditors would arrest him, and Lord Eldon, L.C., said: "There is no instance of paying the debts of a lunatic without reserving a sufficient maintenance for him, as the creditors cannot touch these funds. They may put him in jail, where I can maintain him, and they may sequester his living. These orders are made for the accommodation, not of the creditors, but of the lunatic." There is no precedent for such an order as this under appeal. It prevents the exercise of the jurisdiction of the Lords Justices to provide primarily for the maintenance of the lunatic.

FIELD, J. This case is one of novelty, and also of importance. The question arises on the true construction of 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82. The plaintiff brings himself within the language of 1 & 2 Vict. c. 110, s. 14; he is a judgment creditor, and he has also brought himself within the language of 3 & 4 Vict. c. 82, because he is a judgment creditor, and the judgment debtor has an "interest" in funds standing "in the name of the Accountant-General of the Court of Chancery"—now the Paymaster-General. The fund is derived from the proceeds of the sale of furniture, the property of the lunatic. It appears that the Lords Justices thought it desirable to sell the furniture and that the proceeds should be invested in the funds to his credit, he being a lunatic. The first question in logical order is whether the learned Judge at Chambers had jurisdiction over that particular fund?

(1) 8 Ves. 81. (2) 19 Ves. 280. (3) 14 Ves. 182.

It is not raised directly by the appeal, but inasmuch as it is necessary to vary the order of the learned judge below, I think we must make such order as he ought to have made in toto, and that the committee was entitled to take the point. But I think that the point fails altogether. I think the object of these Acts was to do no more than to create such a charge as the debtor himself could have created. The legislature began tentatively at first, and limited itself to funds standing in the "name of the debtor or of any person in trust for him." It was not necessary that he should have the whole interest if he had any interest. That enactment did not go far enough, and was amended by 3 & 4 Vict. c. 82, which speaks of funds standing in the name of an officer of the Court of Chancery, omits the words "in trust for him," and enacts that whatever interest the debtor has shall be subject to equitable execution, enlarging the previous power of a judge to charge such funds, and expressly providing that it shall have no greater effect than if the debtor charged them himself, thereby almost repeating the words of the earlier Act that "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." Therefore, in my opinion, the learned judge had power to make some order. The order which he has made is that so much of the defendant's interest in the fund is to stand charged with the payment of the sum due in the said judgment "as the Lords Justices sitting in Lunacy may deem applicable to payment of the said judgment debt." The learned counsel for the plaintiff says that the terms of the order, and the omission of the learned judge to say what part of the funds he thinks fit to charge, were beyond his power. I think so. The statute enacts that "It shall be lawful for a judge . . . to order that such stock . . . or such part thereof . . . as he shall think fit, shall stand charged." The meaning of it is plain to my mind. Here, as an illustration, is a sum of 3204*l.* 2*s.* 8*d.*, in which the judgment debtor has an interest. The debt is only 61*l.* 12*s.* 6*d.*, so that it is not right to give the creditor a charge over the whole. The power in the judge was to ascertain what sum, part of the fund, ought to be charged. Instead of doing so, he orders that so much of the fund is to stand charged with

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Field, J.

payment of the debt as the Lords Justices sitting in Lunacy may deem applicable. The effect of that order is—not to give the judgment creditor the remedy provided by the statute, by which he may have a charge on such part of the fund as the learned judge himself thinks right, but—to send the creditor to the Lords Justices, who are to exercise their discretion only in respect of such part of the fund as they may deem applicable to payment of the said judgment debt. I know of no statute or authority which would justify the learned judge in making an order in those terms, or which would give the Lords Justices such jurisdiction. They will have jurisdiction hereafter to consider the important questions which have been raised on behalf of the committee. But the time has not come, nor have we jurisdiction, to enter into those questions. We have only to see whether the judgment creditor has a right under the statute to have the order made. The considerations which have been urged against the order all arise from the unhappy condition of the judgment debtor. If, instead of being sold by order of the Lords Justices, the furniture had been sold by him, and the proceeds invested by him, there would have been no question whatever. But it is argued that as the debtor is found lunatic, and his affairs are under the management of the Lords Justices with full jurisdiction to deal with this property, we must stay our hands, and our jurisdiction to make the order is destroyed. I cannot yield to that argument. In *In re Hastings* (1) Lord Eldon decided that he would not interfere to hand over a sum of 5000*l.* in the bank to creditors of a lunatic, and if we had been sitting here as a Court applied to by the creditors to hand over funds under our control we might have been called upon to act on the same principles. But the Lord Chancellor most distinctly intimated that he could not interfere with the legal remedy. The creditor had the right to execute a ca. sa. "I cannot help it," said Lord Eldon in effect, "I must maintain the debtor when in gaol; or the creditor may sequester the living, or issue an elegit. I cannot prevent it." Perhaps he might have said also, if the debtor had executed a mortgage, and covenanted to pay so much a year as interest. "I cannot interfere with that."

(1) 14 Ves. 182.

At first I thought our order would be of no effect anywhere, but now I am not sure of that, for if the judgment creditor applies in Chancery to have the funds sold, he may or may not have a right to have them sold with or without reference to the jurisdiction of the Lords Justices to care for the interest of the lunatic. But that is the time when the question as to the right to dividends or interest, or whether the Court of Chancery may postpone the rights of the creditor to the maintenance of the lunatic, will arise. Understanding that Chancery does not interfere with the legal right, I can understand the principle of the cases, from which it appears that when dealing with the funds of a lunatic in Chancery the Court says, "the man shall not starve, if you want our help in dealing with them, we will see that he is kept alive." Just as when application is made to Chancery by a husband to enable him to reach property in right of his wife, the Court will not give it him without a settlement on his wife, or in the case of an equitable mortgagee by deposit of deeds where Chancery says, "if you have to come to us you shall do what we think right," and the jurisdiction exercised in *In re Pink* (1) seems to rest on the same principle. These matters, important to consider before the fund is handed over, are not for us now to deal with. Our duty is to give effect to the Act. I find in it no exception, nor anything pointing to any distinction between a sane person or a lunatic. If an order could have been made before the petition and inquisition in lunacy, I think it may be made now, otherwise it would be in the power of the Court—itself a Court of Equity—to abstract from all the creditors of the lunatic the whole of their common law rights, and, if the fund was small and the expense of keeping the lunatic large, to deprive them of all their legal remedies. We ought to see clear statutory language leading to such a conclusion before arriving at it. On the simple construction of the statute the order as framed cannot be supported, and should be varied by charging 70*l.* of the fund under this order.

CAVE, J. I am of the same opinion. A lunatic must pay his debts; and his creditors have the ordinary rights of creditors to obtain payment of those debts. In 1807, when *Ex parte*

(1) 23 Ch. D. 577.

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Cave, J.

Hastings (1) was decided, Lord Eldon held that his duty was to the lunatic only, and that he was not bound to assist the creditor to get payment of the lunatic's debts out of funds not within the creditor's reach; but at the same time the Lord Chancellor clearly recognised the fact that the creditor was entitled to have recourse to all the means which the law afforded him to obtain payment of his debt. Subsequently the legislature increased the rights and remedies of creditors against the property of their debtor. 1 & 2 Vict. c. 110, entitled the creditor to obtain a charging order on certain funds and other securities standing in the name of a debtor or of a trustee for him. That provision, although a great improvement, was found to be defective; for there were other funds which creditors were still unable to reach. Therefore 3 & 4 Vict. c. 82, was passed, extending the remedies of creditors against the interests of debtors in funds standing in the name of the Accountant-General in Chancery for their benefit. The language of the Act is general, no distinction being drawn between the property of lunatics and the property of other persons; and, as the object which the legislature seems to have had in view was the extension of the remedy of a creditor against the property of his debtor, there is no reason why that remedy should not be applicable in the case of lunatics as well as in the case of the sane. The legislature has never shewn any intention that a lunatic should be treated differently to other persons, with respect to his debts; and that the legislature does not intend that lunatics should be treated differently from other persons is shewn by the fact that a lunatic unable to pay his debts can be made bankrupt. Of course, if he is made bankrupt the whole of his property vests in the trustee for division amongst his creditors. The Lord Chancellor and Lords Justices sitting in Lunacy have never interfered to prevent a creditor obtaining payment of his just debt from a lunatic, although they have declined to assist the creditor when his remedy was defective. In the case of *In re Pink* (2) there was a proposal for an order that certain moneys should be paid for the past maintenance of the lunatic, and a dividend to the other creditors, the estate being insolvent; and Lindley, L.J., at chambers,

(1) 14 Ves. 182. (2) 23 Ch. D. 577.

considered that the creditors, being largely interested, should have an opportunity of being heard in Court; but, when the case came before the Lords Justices, they said that their jurisdiction was to be exercised in the interest of the lunatic, and not for the benefit of creditors. The decision goes no further than that. There is, therefore, no objection to an order in the terms proposed by Field, J. There was a sound objection to the order as it originally stood. The Lords Justices are not the persons to determine what part of the fund shall be charged. On what principle could it be left to them? If they are to exercise the same jurisdiction as that of the learned judge at chambers, there is no ground for applying to them. But, if they are to exercise jurisdiction in a different manner, treating the fund as some property which could not be got at without their aid, and considering the interest of the debtor, I think that would be wrong; for it is not what the legislature intended. I think the order should be absolute, and not conditional, as it was made at chambers, and be limited as my brother Field has suggested.

Appeal allowed.

Solicitors for plaintiffs: *Warriner & Kinch.*
Solicitors for defendant: *Aldridge, Thorn & Morris.*

J. R.

1889
July 18.

[IN THE COURT OF APPEAL.]

LEA *v.* CHARRINGTON.

Malicious Prosecution—Criminal Law—Criminal Law Amendment Act, 1885 *—Issue of Warrant—Judicial Act.*

APPEAL of the plaintiff from the judgment of the Queen's Bench Division (Pollock, B., and Manisty, J.), reported ante, p. 45.

The action was for malicious prosecution, and was tried before Grantham, J., who nonsuited the plaintiff. At the trial it appeared that the defendant swore an information against the plaintiff for an offence against the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), on the strength of a statement made to him by a third person. A magistrate thereupon issued a warrant to arrest the plaintiff, who was committed for trial, and tried and acquitted.

An application to the Queen's Bench Division for a new trial was refused on the ground that the case came within the decision in *Hope* v. *Evered.* (1)

On appeal,

Morten, for the plaintiff, contended, among other things, that the facts shewed that the person on whose statement the plaintiff acted was untrustworthy; that he ought to have seen this and made further inquiries; and that under these circumstances there was a case to go to the jury.

McCall, contrà.

THE COURT (Lord Esher, M.R., Cotton and Lindley, L.JJ.), without deciding whether the case of *Hope* v. *Evered* (1) applied, were of opinion that there was, on the facts proved at the trial, no evidence to go to the jury of want of reasonable and probable cause, and that therefore the nonsuit must be supported.

Appeal dismissed.

Solicitor for plaintiff: *Geo. Kebbell.*

Solicitors for defendant: *C. V. Young & Co.*

(1) 17 Q. B. D. 338.

A. M.

THE QUEEN *v.* SHELLARD AND OTHERS, JUSTICES, AND MANSEL JONES.

1889
May 29.

Municipal Corporation—Election Petition—Trial—Corrupt Practice—Indictable Offence—Order by Court for Prosecution of Offender—Evidence taken on Trial of Petition—Commencement of Prosecution—Corrupt and Illegal Practices Act, 1883 (46 *&* 47 *Vict. c.* 51), *ss.* 38, 51, 55—*Municipal Elections (Corrupt and Illegal Practices) Act,* 1884 (47 *&* 48 *Vict. c.* 70), *s.* 28, *sub-ss.* 5, 6 (*c*).

By s. 28 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, power is given to the director of public prosecutions to attend at the trial of municipal election petitions and to prosecute for corrupt or illegal practices offenders to whom a certificate of indemnity has been refused, and by sub-s. 5, "where a person is so prosecuted for any such offence, and . . . . he does not appear . . . . the Court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted. . . . :"—

Held, that "the evidence" which is to satisfy the Court before it makes the order means the evidence given during the trial of the petition, and that therefore a commissioner for the trial of municipal election petitions acted within his jurisdiction in ordering the prosecution of a person to whom he had refused a certificate of indemnity, and who did not appear, without rehearing the evidence affecting him, and also acted within his jurisdiction in issuing a summons under s. 28, sub-s. 6 (*c*), for his attendance before a Court of summary jurisdiction for the purpose of being formally committed for trial.

ORDER calling upon three justices of the peace and H. R. Mansel Jones, Esq., the commissioner appointed to try an election petition presented against the return of two persons as members of the town council for a ward of the municipal borough of Hereford, to shew cause why a writ of certiorari should not issue to bring up a certain order and summons for the purpose of their being quashed.

It appeared that during the trial of the election petition one Giles, who was not a party to the petition nor a candidate on whose behalf the seat was claimed, was served with a notice under s. 38, sub-s. 1, of the Corrupt Practices Act, 1883, calling upon him to shew cause why he should not be reported as guilty of bribery, in relation to which certain proceedings were taken which are reported sub nomine *Reg.* v. *Mansel Jones.* (1) Judgment was given on the election petition on April 17, 1889, and

(1) Ante, p. 29.

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in the course of the judgment the commissioner announced his intention of reporting that the said Giles had been guilty of a corrupt practice and of refusing him a certificate of indemnity; at the conclusion of the judgment the representative of the director of public prosecutions applied to the commissioner for an order directing the prosecution of Giles at the next assizes for a corrupt practice. Giles was not at that time present in the Court, but his brother and his solicitor were present, and he was called upon to appear to shew cause why he should not be prosecuted, and the Court was adjourned for a short interval to enable him to attend. He did not attend, his brother stating that in taking the course he did he was acting under advice. The commissioner then announced that in his opinion the evidence given upon the trial of the petition was sufficient to put Giles upon his trial for bribery, and made an order that he be prosecuted on indictment to be preferred against him at the then next assizes at Hereford, and upon the further application of the representative of the director of public prosecutions issued a summons directing Giles to appear on April 25, before a Court of summary jurisdiction to be committed to the next assizes to take his trial or to give bail to appear at the assizes and take his trial. Giles appeared on April 25, under protest, before three justices in petty sessions, but no order for his committal was then made, it being represented to the justices that the present proceedings were about to be taken. On a subsequent day an order nisi was obtained on behalf of Giles calling upon the three justices and the commissioner to shew cause why a writ of certiorari should not issue to remove and quash the order of April 17, and the summons of the same date upon the ground (inter alia) that the commissioner acted without jurisdiction or improperly within his jurisdiction inasmuch as no prosecution had been commenced, and no evidence taken, as by law required.

Sir R. E. Webster, Q.C., A.G., and *R. S. Wright* (*Gresham Wells*, with them), for the director of public prosecutions, shewed cause. The effect of s. 28 of the Municipal Elections Act, 1884, is to create an entirely new procedure upon the trial of municipal elections, similar to that upon the trial of parliamentary election

petitions under the Corrupt Practices Act, 1883. By sub-s. 1 the director of public prosecutions is to attend at the trial of every petition for the purpose of securing the disclosure of corrupt or illegal practices, and by sub-s. 3 he has to see to the prosecution of persons for corrupt or illegal practices who have been refused a certificate of indemnity. Under sub-s. 5 (1) the Court, if of opinion that the evidence is sufficient to put a person on his trial, is bound to order him, if he does not appear, to be prosecuted on indictment or before a court of summary jurisdiction, as the case may require; and by sub-s. 6 (*c*), upon the order for prosecution being made, if the accused is not present, the Court is to issue a summons or warrant to get him before a Court of summary jurisdiction for the purpose of his being committed for trial, and that Court, if the offence is an indictable one, is bound to commit him for trial upon proof of the summons or warrant and of the identity of the accused. All these formalities have been complied with. The commissioner was satisfied on the evidence given before him at the trial of the petition that it was a proper case for a prosecution, but it is suggested that he ought to have gone through the form of taking the evidence affecting Giles all over again, sitting for that purpose as a court of summary jurisdiction, so as to make it evidence taken in the prosecution as distinguished from evidence taken on the trial of the petition. This argument, however, loses sight of the scheme of the Act and of the functions of the commissioner as to the direction of further proceedings. There is nothing in s. 28, sub-s. 5, to shew that "the evidence" which the commis-

(1) By the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 28, sub-s. 5: "Where a person is so prosecuted for any such offence, and . . . he does not appear before the Court, ... the Court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted on indictment or before a court of summary jurisdiction, as the case may require, for the said offence."

By sub-s. 6: "Upon such order being made . . . . (*c*) if the accused person is not present before the Court, the Court shall, as circumstances require, issue a summons for his attendance, or a warrant to apprehend him and bring him before a court of summary jurisdiction, and that court, if the offence is an indictable offence, shall, on proof only of the summons or warrant and of the identity of the accused, commit him to take his trial or cause him to give bail to appear and take his trial for the said offence. . . ."

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sioner thinks sufficient to put a person on his trial is not the evidence taken before him sitting as commissioner.

It is true that s. 30 of the Act of 1884 incorporates s. 55 of the Corrupt Practices Act, 1883, which applies the enactments relating to indictable offences to cases where an Election Court orders a person to be prosecuted on indictment in like manner as though the Court were a justice of the peace; but this does not make it necessary to hear the evidence all over again. When a complaint is made before a justice of the peace, the justice, on being satisfied that there is a primâ facie case, can issue a summons or warrant to procure the attendance of the party charged. The course adopted in the present case is precisely analogous; the commissioner has had evidence before him to satisfy him that a primâ facie case is made out for putting the man on his trial, who had an opportunity of appearing before him, and the requirements of s. 55, sub-s. 2, of the Act of 1883 have been satisfied. Then s. 28, sub-s. 5, of the Act of 1884 comes in, the preliminary step necessary to enable a justice of the peace to issue a summons or warrant having been taken or fulfilled by the commissioner being satisfied that the evidence is sufficient to put the man on his trial; that is the condition precedent to a prosecution. The section is silent as to any summons or notice to the man to attend; the only notice required to be given him is one under s. 38 of the Act of 1883 to shew cause why he should not be reported, and this notice Giles had. It makes no difference whether the man appears or not when the order for his prosecution is made, for the function of the Court at this stage is to put the matter in train for trial, and if he is not present the Court rightly issues its summons or warrant to get him before a court of summary jurisdiction for the purpose of being formally committed for trial by the justices, who have no discretion in the matter. If it is not the duty of the justices, who know nothing about the case, to take the evidence before committing for trial, it is absurd to suppose that it is the duty of the Court that already has the evidence upon its records to take it a second time.

H. D. Greene, Q.C., and *Gwynne James*, for the applicant, in support of the order. It was not intended by the legislature that

the making of an order that a person should be prosecuted on indictment, and the subsequent issue of a summons or warrant to attend before the justices and be committed, should be the only steps taken before a man is put on his trial for an indictable offence, or that there should be any departure from the ordinary procedure as regards indictable offences. The effect of incorporating s. 55 of the Corrupt Practices Act, 1883, is also to incorporate Jervis's Acts so far as they are applicable, and it is assumed by the legislature that those Acts will be followed by an Election Court which has a prosecution brought before it. The intention of the legislature was to put the director of public prosecutions in the position of any person who chooses to take criminal proceedings, and if these proceedings are quashed he can still go on in the ordinary way. No prosecution had, in fact, ever been commenced within the meaning of s. 28, sub-s. 4, of the Act of 1884, which must be read in the light of s. 55 of the Act of 1883, for Giles had only been summoned to shew cause why he should not be reported, and was never summoned to answer any criminal charge made, or any criminal proceedings intended to be instituted against him. A prosecution is not commenced until a complaint has been made and a summons or warrant issued. The procedure laid down in s. 28, sub-s. 5, in cases where the person "does not appear," must mean where he does not appear to some process of the Court. Light is thrown upon the meaning of the section by s. 51, sub-s. 2, of the Act of 1883, which is incorporated in the Act of 1884, and which enacts that the issue of a summons, warrant, writ, or other process is to be deemed to be a commencement of a proceeding where service or execution of the same is prevented by the act of the alleged offender, otherwise service of the process is to be deemed the commencement.

[MATHEW, J. Yes, where that is the proper mode of proceeding; but here the action of the director of public prosecutions was the initiation of the proceedings.]

The only difference in the procedure under this Act from that under Jervis's Acts is that s. 28, sub-s. 6 (*c*), gives a power of committal in the absence of the accused. The evidence which by s. 28, sub-s. 5, is to satisfy the Court cannot be limited to the

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evidence taken inter partes on the trial of the petition; it means evidence taken in the course of criminal proceedings against the person charged.

MANISTY, J. I am of opinion that this rule must be discharged. The rule calls upon certain justices and persons to shew cause why a writ of certiorari should not issue to bring up an order of April 17, 1889, to be quashed, and the grounds upon which it is said that that order ought to be quashed are these: first, that the commissioner acted without jurisdiction, or improperly within his jurisdiction in that no prosecution had been commenced and no evidence taken as by law required. I pause there. The facts of this case are that the commissioner was holding his court, and the usual proceedings were taken to bring persons before him who were charged with corrupt practices (in the particular instance with bribery), and Mr. Giles was one of those persons. No doubt, in the first instance, they are there to answer a charge against them with a view to a report being made as to whether they are guilty; that is the primary purpose of their being brought there. But their being before the Court involves the consequences that have been created by Act of Parliament, and it seems to me that no argument has been addressed to us on behalf of the applicant as to the meaning and effect of s. 28, sub-s. 5, and sub-s. 6 (*c*) of the Act of 1884, and that no attempt has been made to get rid of what seems to be clearly the primary purpose and object of that section. It is unnecessary to consider the constitution of the Court; the commissioner was unquestionably a Court with power to report, but before making his report it was necessary that he should have evidence before him satisfying him that the parties had been guilty of the charge, that is to say, that a primâ facie case had been made out against them. That was done in the present case; the applicant declined to attend, though his brother attended for him. Evidence was received which, as a fact, satisfied the commissioner that it was a case which ought to be reported; what then was his power? That is to be found in s. 28, sub-s. 5, "Where a person is so prosecuted for any such offence," that is, brought up before the commissioner and charged with an offence, "and he does not appear before the Court, the Court, if of opinion that the evidence"—that is, the evidence

which has been adduced against the man for the purpose of reporting and rendering him liable to be indicted or prosecuted—"is sufficient to put the said person upon his trial for the offence"—that is, if the person does not appear and the evidence is sufficient in the opinion of the commissioner—"the court shall order such person to be prosecuted," &c. That was done. Upon the evidence which had been offered, the party not appearing, the commissioner is empowered to order, and ought to order, the party to be prosecuted, and in this case he ordered a prosecution on indictment.

Then we come to sub-s. 6 (*c*), which must be read, no doubt, in conjunction with sub-s. 5: "If the accused person is not present before the Court"—that was this case—"the Court shall, as circumstances require, issue a summons for his attendance, or a warrant to apprehend him and bring him before a Court of summary jurisdiction;" that applies only to a summons or a warrant, a summons to bring him before a Court of summary jurisdiction or a warrant if they have reason to suspect he will escape; "and that Court, if the offence is an indictable offence, shall, on proof only of the summons or warrant and the identity of the accused, commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence." That was this case. Evidence had been taken, the man had had the opportunity of appearing and did not appear, and the evidence satisfied the commissioner that it was a case for reporting, and that the man ought to be prosecuted; the man is then to be brought before the Court of summary jurisdiction by summons or warrant, and that Court is, upon proof only of the summons or warrant, and the identity of the person, to commit him to take his trial. These provisions of the Act seem to me to be perfectly clear apart from all consideration of Jervis's Act; no doubt their effect is to supersede some of the procedure under the latter Act, but I have heard scarcely a suggestion, certainly not an argument, why effect should not be given to the language of s. 28, sub-s. 6 (*c*). In my opinion, therefore, the real ground upon which this rule was obtained entirely fails.

MATHEW, J. I am of the same opinion. The question is now reduced to a very narrow compass, that of the meaning of the

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words "the evidence" in s. 28, sub-s. 5 of the Act of 1884. The whole scheme of that Act, as it appears to me is to introduce a new procedure in prosecutions under the statute, arising out of evidence taken before a commissioner on the hearing of an election petition. The section says, and says plainly, that it is the duty of the commissioner to order a prosecution, if in his opinion the evidence is sufficient to satisfy him that the person ought to be put upon his trial. The argument of Mr. Greene is that "the evidence" means the evidence given in the ordinary course after the institution of an ordinary prosecution; and it was suggested by him that the intention of the legislature was that, although the commissioner had made up his mind and had fully satisfied himself that the evidence given before him was sufficient to justify the committal of the man for an indictable offence, it was nevertheless his duty to hold an independent Court, sitting as it were as a magistrate, and to hear the evidence affecting the man all over again for the purpose of formulating the charge against him. In my opinion such a mode of procedure would be dilatory, expensive and useless, and the intention suggested is the last intention that we ought to attribute to the legislature. If they had such an intention, we should expect to find in the statute an express power in the public prosecutor to summon witnesses for the purpose of such inquiry; but no such power is given.

An attempt has been made by Mr. Greene to incorporate in this Act the provisions of Jervis's Act, and it is true that to a certain extent they are incorporated; but the argument was that it was intended by incorporating Jervis's Act in the Act of 1884 to repeal certain provisions of the last-named statute. I cannot agree with that contention; the statutes must be read together, but Jervis's Act cannot be construed to control a specific enactment in the Act which incorporates it. The sections of the Act of 1884 apply to particular cases, and their language appears to me to be clear beyond all doubt.

Order discharged.

Solicitors for applicant: *T. White & Sons, for Garrold, Hereford.*

Solicitor for the director of public prosecutions: *Solicitor to the Treasury.*

W. J. B.

[IN THE COURT OF APPEAL.]

1889
June 20.

KING *v.* LONDON IMPROVED CAB COMPANY, LIMITED.

Hackney Carriage—Negligence of Driver—Liability of Proprietor—Metropolitan Hackney Carriages Acts, 1 *&* 2 *Wm.* 4, *c.* 22, *and* 6 *&* 7 *Vict. c.* 86.

Under the Metropolitan Hackney Carriage Act, 1843, so far as the public is concerned, the proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire, as if the relationship of master and servant existed between them.

Venables v. *Smith* (2 Q. B. D. 279) approved.

APPEAL by the defendants from a judgment of the Queen's Bench Division on appeal from a county court.

The action was to recover damages for personal injuries sustained by the plaintiff through the negligent driving of one Moore, alleged to be a servant of the defendants, while driving a horse and cab owned by them. The negligence and the relationship of master and servant between the defendants and Moore were denied. At the trial the jury found on both points against the defendants. It was proved or admitted that the cab and horse were the property of the defendants, and that they were the registered owners. Moore, who was a licensed driver, had no written agreement with the defendants, but the terms on which he drove were that he should pay 16*s.* a day, retaining all earnings above that sum, and that the engagement should be for the day without necessity for notice on either side to terminate it. Moore's licence was deposited with the defendants so long as he should be engaged to drive for them. The defendants' manager deposed that they had no control over a driver, and that all they could do, if dissatisfied with him, was to refuse to let him have a cab. The county court judge in charging the jury, told them that it must be taken as settled law that the relation of master and servant existed between the registered proprietor and the licensed driver of a hackney cab, under the provisions of the Hackney Carriage Act (6 & 7 Vict. c. 86), so as to render the proprietor liable for the acts of the driver whilst plying for hire, and that upon the evidence the jury ought to find as a fact that

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such relationship existed between the defendants and the driver. The judge was of opinion further that the evidence brought this case within *Powles* v. *Hider* (1) and *Venables* v. *Smith* (2), in which cases the proprietor supplied both cab and horse as in the present case, and not a cab only as in *King* v. *Spurr*. (3)

A verdict passed for the plaintiff for 50*l.*, and the defendants appealed to the Queen's Bench Division on the ground of misdirection.

The Court (Lord Coleridge, C.J., and Manisty, J.) confirmed the judgment of the county court, but gave leave to appeal.

Murphy, Q.C., and *Gore Brown*, (*English Harrison*, with them), for the defendants. The question is whether on the construction of the Hackney Carriage Act (6 & 7 Vict. c. 86), the relation between the defendants and the driver is that of bailor and bailee or master and servant. *Powles* v. *Hider* (1) decided that in such a case as the present the relation of master and servant so far exists as to render the proprietor responsible to the public for the acts of the driver, but that case was decided substantially on the provisions of the earlier Hackney Carriage Act (1 & 2 Wm. 4, c. 22, s 20), as to plates on the cabs with the names of proprietors. That Act was repealed in part by the Customs and Inland Revenue Duties Act, 1869 (32 & 33 Vict. c. 14), s. 39, though the repeal does not seem to have been noticed in the subsequent cases. In *Fowler* v. *Lock* (4) the Court were divided on the question, and on appeal no decision on the point was come to, as appears by the note in Law Rep. 9 C. P. 751. In 1877, *Venables* v. *Smith* (2) was decided in conformity with *Powles* v. *Hider*. (1) In *King* v. *Spurr* (3) the letting was only of a cab and not of a cab and horse, but that makes no difference in principle. The action was by a stranger to the contract for negligence, as in this case, and it is submitted that the doubts thrown on the wide view of the Act adopted in the former cases are well founded. There is nothing in 6 & 7 Vict. c. 86, expressly creating the relation of master and servant between the proprietor of a hackney carriage and the driver, and some of the provisions are inconsistent with that view.

(1) 6 E. & B. 207; 25 L. J. (Q.B.) 331.
(2) 2 Q. B. D. 279.
(3) 8 Q. B. D. 104.
(4) Law Rep. 7 C. P. 272.

C. W. Mathews, for the plaintiff, was stopped.

Gore Brown replied.

LORD ESHER, M.R. Having listened to the cases which have been cited, and carefully examined the provisions of the statute, I have come to the conclusion that the defendants are liable. In my opinion the agreement proved to have been made between them and the driver did not constitute the latter their servant. The payment of a certain sum to the proprietor every day and the retention of the remainder of the earnings may be considered as a mode of payment of wages, but it seems to me that the agreement did not give to the proprietor such control as he would have over a servant. Further, I do not consider that the cases decided as to the hiring of a cab will conclude this case which arises between a stranger who has not hired the cab and the proprietor. Lord Campbell's judgment in *Powles* v. *Hider* (1) may be upheld on the ground that the proprietor had held himself out as owner to the person who hires a cab. The question here is a different one, and arises on the construction of the Act. Without going in detail through the sections of the Act it seems to me to be a necessary implication arising from them that the Act was made in favour of the public irrespective of the agreement that might subsist between the proprietor and the driver. I have come to the conclusion that by virtue of the Act the public are entitled, whether as between the proprietor and the driver the relationship of master and servant exists or not, to say that so far as the public are concerned that relationship must be deemed to exist. That was the view taken by Cockburn, C.J., and Mellor, J. in *Venables* v. *Smith* (2), and also by Willes, J., in *Fowler* v. *Lock*. (3) I think that is the right view of the statute, and that the decision in this case was right. The appeal should therefore be dismissed.

LINDLEY, L.J. I am of the same opinion and for the same reasons. I will only add that the regulations as to what has to be registered and accessible to the public seem to be based on

(1) 6 E. & B. 207; 25 L. J. (Q.B.) 331. (2) 2 Q. B. D. 279.
(3) Law Rep. 7 C. P. 272.

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the supposition that where a proprietor allows persons to drive his cabs in the public streets such persons so far as the public are concerned are to be deemed servants of the proprietor. All the cases except *King* v. *Spurr* (1) are consistent with this view, and that case may be distinguishable, though the distinction may not be a very broad one, for there the cab only was hired by the driver, and the horse was his property.

LOPES, L.J. If it were not for the Act of Parliament I should have said that the relationship between the cab proprietor and the driver was that of bailor and bailee. The question, however, turns on the true construction of 6 & 7 Vict. c. 86, and that, in my opinion, puts the driver so far as regards the public in the position of servant, and the proprietor in the position of master with the liabilities that attach to that position. It is true that the driver is paid by the amount of his receipts over a fixed sum which he has to hand over daily, but that is only a mode of paying wages, and whether they are paid in that manner or in some other way, weekly or otherwise, seems to me to make no difference in the effect of the Act.

Appeal dismissed.

Solicitor for plaintiff: *Hugh C. Godfray.*
Solicitor for defendant: *W. Tyndale Moore.*

(1) 8 Q. B. D. 104.

A. M.

WATKINS *v.* THE SCOTTISH IMPERIAL INSURANCE COMPANY.

1889
May 27

Practice—Service of Writ—Scotch Corporation with Branch Office in England—Action for Breach of Contract—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 62—*Order* IX., *r.* 8.

A company having its registered office in Scotland, but also carrying on its business within the jurisdiction of the High Court, cannot be served with a writ of summons within the jurisdiction.

APPEAL from Chambers.

Action by plaintiff, as administratrix of her husband, on a policy of life assurance effected by the latter with the defendants, with an alternative claim for damages for refusing to issue a policy on the life of the deceased. The defendants have their registered office in Glasgow, and their secretary resides there; they have also branch offices and agencies in England, with a head branch office for England in London. The insurance in question was effected by the plaintiff's husband with the defendants' inspector of agency at their London office. The writ in the action was served on the defendants at their office in London, but on the application of the defendants the service was set aside by the master in chambers, whose decision was affirmed by Stephen, J. The plaintiff appealed.

W. H. C. Payne, (*H. C. Richards* with him), for the plaintiff. The service was good. The defendants are a foreign corporation, having an office and carrying on business in England, and the service of a writ of summons on the head officer of an English branch of a foreign corporation carrying on business in England is good service: *Newby* v. *Von Oppen* (1); *Lhoneux* v. *Hong Kong and Shanghai Banking Corporation.* (2) The case is distinguishable from *Jones* v. *Scottish Accident Insurance Co.* (3), where an application for leave to issue a writ for service out of the jurisdiction was refused on the ground that the defendants were not domiciled or ordinarily resident within the jurisdiction. The

(1) Law Rep. 7 Q. B. 293. (2) 33 Ch. D. 446.
(3) 17 Q. B. D. 421.

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provisions of s. 62 of the Companies Act, 1862 (1), are not compulsory in the present case, for the defendants carry on business within the jurisdiction, and service at their registered office in Scotland is unnecessary.

Reginald Brown, for the defendants, referred to *Wood* v. *Anderston Foundry Co.* (2), but was not called upon to argue.

MATHEW, J. Undoubtedly there is hardship in making the plaintiff sue in the Scotch courts, but there is an insurmountable difficulty in the way of her suing in England. The defendants are a corporation carrying on business both in Scotland and England, but their registered office is in Scotland, and they are ordinarily resident in that country. We are bound by the language of the rules, and their clear meaning is that Scotchmen and Irishmen cannot be sued in England, if they are domiciled or ordinarily resident in Scotland or Ireland; and the effect of s. 62 of the Companies Act, 1862, which provides for service upon companies generally, and which is expressly preserved by Order IX., r. 8 (3), makes the principle of these rules applicable to Scotch and Irish corporations. The appeal must be dismissed.

GRANTHAM, J. I am of the same opinion. It seems a hard case, but it is a clear one.

Appeal dismissed.

Solicitors for plaintiffs: *Maylor & Fawssett.*

Solicitors for defendant: *Linklater & Co.*

(1) By s 62 of the Companies Act, 1862 (25 & 26 Vict. c. 89), "any summons, notice, order, or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company at their registered office.

(2) 36 W. R. 918.

(3) By Order IX. r. 8, provision is made for the service of writs upon corporations aggregate "in the absence of any statutory provision regulating service of process."

W. J. B.

[IN THE COURT OF APPEAL.]

1889
July 16.

MORRIS AND WIFE *v.* EDWARDS.

Practice—Discovery—Documents of Title—Privilege—Affidavit of Documents—Interrogatories in Contradiction of—Contentious Affidavit.

The defendant in an action for recovery of land having made an affidavit of documents, which stated that he had in his possession certain documents tied up in a bundle marked with the letter A, and that he objected to produce such documents on the ground that they related solely to his own title and did not in any way tend to prove or support the title of the plaintiffs, the plaintiffs administered an interrogatory to the defendant, asking whether such documents did not include a particular document mentioned and relied upon by the plaintiffs in their statement of claim. The defendant objected to answer such interrogatory. The plaintiffs thereupon applied for an order that the defendant should further answer the interrogatory, and on such application sought to make use of an affidavit in contradiction of defendant's affidavit of documents:—

Held, that a contentious affidavit was not admissible to contradict the defendant's affidavit of documents, and that the plaintiffs were not entitled to a further answer.

APPEAL from the order of the Queen's Bench Division (Denman and Charles, JJ.) ordering the defendant to make a further and better answer to interrogatories.

The facts were as follows. The action was brought for recovery of land. The statement of claim stated in substance that William Powell, deceased, who was the owner of the land in question, had by his will devised the same to Eliza Price for life, and after her death to the plaintiff Ann Morris: that the tenant for life entered, and afterwards married, and the defendant having purchased from her and her husband their interest entered into possession of the land: and that the tenant for life was since dead, but the defendant remained in possession of the land, and of the title deeds and will of Powell. By his defence the defendant pleaded that he was in possession of the land and the Statute of Limitations. The plaintiffs having obtained an order for discovery, the defendant made an affidavit of documents in which he stated (inter alia) that he was in possession of certain deeds and documents of title numbered 1 to 8, and which were tied up in a bundle marked with the letter A, and that he objected to produce

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the same on the ground that they related solely to his own title to the land in question, and did not in any way tend to prove or to support the title of the plaintiffs or either of them. Thereupon the plaintiffs, having obtained leave to interrogate the defendant, administered the following interrogatories: (1) Do the deeds and documents of title, numbered 1 to 8, tied up in a bundle marked with the letter A, mentioned in your affidavit of documents, include the will of William Powell, deceased, in the statement of claim in this action mentioned, late of &c., or any copy thereof, extract therefrom, or recital thereof? (2) Have you ever seen, and if so, when last, and where, any such will or any copy thereof, extract therefrom, or recital thereof? The defendant answered that he objected to answer the interrogatories on the ground that they inquired as to written documents, and that he had already made an affidavit of documents sworn, &c., and that all the documents in his possession related solely to his own title to the land in question, and might be used by him in evidence, and did not in any way tend to prove or to support the title of the plaintiffs.

The plaintiffs thereupon applied for an order for a further and better answer to the interrogatories. The order was granted by the Master, and affirmed on appeal by Wills, J., at Chambers, and by the Divisional Court.

Bosanquet, Q.C. and *S. J. Weyman*, for the defendant. The plaintiffs are not entitled to a further answer to the interrogatories. The case of *Bewicke* v. *Graham* (1) shews that the defendant's affidavit of documents is sufficient; that being so, *Nicholl* v. *Wheeler* (2) decides that it is not permissible to cross-examine on an affidavit of documents by means of interrogatories. The plaintiffs will seek to use an affidavit to shew that the will in question relates to their title, and came into the possession of the defendant, but in *Jones* v. *Monte Video Gas Co.* (3), it was held that a contentious affidavit, by which it was sought to shew that the affidavit of documents was not sufficient, was not admissible. Certain special circumstances, in which a further affidavit of

(1) 7 Q. B. D. 400. (2) 17 Q. B. D. 101.
(3) 5 Q. B. D. 556.

documents might be ordered, were mentioned in the judgment in that case; but no such circumstances exist in the present case.

[They also cited *Adams* v. *Lloyd.* (1)]

Reg. Brown, for the plaintiffs. The authorities shew that this is a matter of discretion. *Hall* v. *Truman, Hanbury, & Co.* (2) shews that there may be cases, in which after a sufficient affidavit of documents has been made, the Court will allow the opposite party to deliver interrogatories as to some specific document, and whether this shall be allowed is a question for the discretion of the judge in the particular case. On this question, therefore, the plaintiffs' affidavit is admissible to shew that such document is in the defendant's possession.

[THE COURT refused to allow the plaintiffs' affidavit to be used.]

Having regard to the pleadings, it is contended that a sufficient primâ facie case for a further answer is shewn within the meaning of the rule in *Jones* v. *Monte Video Gas Co.* (3) If the defendant's affidavit is entirely true and bonâ fide, why should he wish to avoid answering whether he has this document in his possession? He has pleaded the Statute of Limitations, and it may well be that, though he has a document which relates to the title of the plaintiffs, he may consider himself justified in swearing that it does not, because such title is barred by the statute.

LORD ESHER, M.R. In this case an action is brought for the recovery of land. The defendant pleads that he is in possession, and therefore puts the plaintiffs to proof of their title. Thereupon, the plaintiffs, in order to make out a case, take advantage of the power given them by law to ask for discovery of documents. In answer the defendant is entitled to say, that, though he has certain documents relating to the matter in dispute, such documents relate solely to his own title and do not in any way support the plaintiffs' title. Accordingly, the defendant makes that answer to the plaintiffs. The question is whether the law is not that, under those circumstances, the defendant having sworn that the documents in question are his

(1) 27 L. J. (Ex.) 499. (2) 29 Ch. D. 307. (3) 5 Q. B. D. 556.

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title deeds, and relate solely to his own title, and do not support the plaintiffs' title, the plaintiffs are not entitled to ask anything more about those documents. It appears to me to have been laid down over and over again that, if the plaintiff takes advantage of the right to discovery, and gets that answer, he can go no further, and he must be satisfied. As to documents other than documents of title, the law is pretty nearly on the same footing; but it has been held in *Jones* v. *Monte Video Gas Co.* (1) that the party seeking discovery would under certain circumstances not be bound to rest satisfied with the answer. The defendant there said not that the documents were his title deeds but that they were not material or relevant to the action. As a general rule, the party asking for discovery is bound to take that answer; but the Court said in that case that, if certain matters are brought before it in a certain way, the Court has a discretion to make an order for a further affidavit. The judgment says: "We have consulted all the other members of the Court of Appeal, who usually sit and act, and we are of opinion that the rule to be observed is as follows: either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit; but, except in cases of this description, no right to a further affidavit exists in favour of the party seeking production. It cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient." Nothing can be plainer than that. It was not said with regard to documents of title. With regard to documents of title I think the law, which requires a plaintiff to be satisfied with such an answer in an affidavit of documents as the defendant here makes, is most strict, and I doubt whether the special circumstances referred to in *Jones* v. *Monte Video Gas Co.* (1) would have any application to the case of title deeds. But, assuming that they would, I do not think that in this case there are any such

(1) 5 Q. B. D. 556.

circumstances. The only circumstance which could be relied upon was, that the plaintiffs seek to produce an affidavit by which they endeavour to shew that the defendant has a document among the documents in question which relates to their title. This is really what has been described as a cross-examination of the defendant on the statement in his affidavit of documents that the documents are his title deeds and relate solely to his title, which is clearly inadmissible. I am of opinion that the Court below had no authority to compel the defendant to answer the interrogatories in the way proposed, and therefore this appeal must be allowed.

COTTON, L.J. I also am of opinion that the decision of the Court below cannot be supported. There are several objections to these interrogatories and to their judgment. First, I think that the interrogatories amount to an obvious cross-examination of the defendant on the affidavit which he has made, such as was held to be inadmissible in the case of *Nicholl* v. *Wheeler*. (1) The interrogatories refer to the documents mentioned in a certain schedule to the defendant's affidavit, as to which he has sworn in terms which seem to me sufficient that they relate to his title only and do not support that of the plaintiffs. The question asked is whether there is among those documents a particular document, the suggestion being that such document is the will referred to in the statement of claim. Such a question is clearly a cross-examination of the defendant upon a suggestion that one of the documents referred to in his affidavit of documents does not relate solely to his own title. Then there is this further objection. The defendant claims privilege in respect of all these documents as his title deeds. What is the object of such interrogatories as these? Must they not be followed by an application for the production of the document referred to, for the Court to determine whether the document does support the title of the plaintiffs or not? Such a course would be altogether wrong and contrary to principle. In cases of discovery the general principle is that the party applying for discovery is bound by the answer on oath of the other party. In seeking production of a

(1) 17 Q. B. D. 101.

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document the plaintiffs are seeking discovery, and the principle applies that the party applying for discovery is bound by the affidavit made by the party of whom discovery is asked. If this interrogatory were answered, it would be quite wrong in my opinion to say that the document ought to be produced to determine whether its effect was correctly stated by the defendant's affidavit, in which he claims privilege against production. It was said that the matter was one of discretion, and that we ought not to interfere with the exercise of their discretion by the Court below. I do not think that contention is correct. If the defendant is privileged with respect to these documents under the circumstances, he has a right to protection in respect of them, and there is no discretion to deprive him of his privilege. Reliance was placed for the plaintiffs on *Hall* v. *Truman, Hanbury, & Co.* (1); but that case is really no authority for the plaintiffs' contention. That was a case where the Court had a discretion to exercise, and not one of privilege with regard to title deeds. With regard to the affidavit sought to be produced by the plaintiffs on the question whether the answers to these interrogatories are sufficient, I do not think any such affidavit can be received. I do not think an affidavit ought to be received to shew that the affidavit of documents is insufficient, with a view to obtaining further discovery; to admit such an affidavit would be contrary to *Jones* v. *Monte Video Gas Co.* (2), and I think it would be equally wrong to allow such an affidavit to be used in determining whether the answer to these interrogatories is sufficient. To determine the sufficiency of such answer the Court ought, no doubt, to look to the cases made by both parties in their pleadings; but in this case the defendant merely pleads that he is in possession, and puts the plaintiffs to proof of their case. In my opinion we cannot allow any affidavit to be produced by the plaintiffs to contradict the defendant's affidavit, and shew that the privilege claimed is improperly claimed, or to shew that the answers to these interrogatories are insufficient.

LINDLEY, L.J. I quite agree that this question cannot be regarded as one of discretion. The privilege claimed by the

(1) 29 Ch. D. 307. (2) 5 Q. B. D. 556.

defendant is a matter of right. The question is whether the answer of the defendant to these interrogatories is sufficient. To my mind the case presents some difficulty. I do not, however, see how it is possible to say that these interrogatories are not a cross-examination of the defendant on his affidavit of documents; and, if so, the rule that has been laid down to the effect that such cross-examination cannot be allowed appears to apply. The difficulty in this case has arisen from certain expressions in the case of *Hall* v. *Truman, Hanbury, & Co.* (1) having been taken without reference to the necessary qualifications. It may be that, if the Court can see from the affidavit of documents, or from the description of the documents therein, or from any other affidavit or pleading of the party from whom discovery is sought which contains admissions, that the affidavit of documents is insufficient, those would be legitimate sources from which the Court may arrive at the conclusion that a further affidavit ought to be made. But I do not understand that the practice allows the other party to allege that the party from whom discovery is sought has some document in his possession in contradiction of the affidavit of documents, which is what the plaintiffs here seek to do. I see the advantage that may be taken of the practice in this respect, and I confess to feeling some alarm in regard to it. The defendant here has availed himself of the practice of putting the documents in a bundle, and so preventing any possibility of seeing whether they answer to the description he gives of them. I fear that in some cases an unfair advantage may be taken of this practice, but it does not follow that, because that is so, it would be right that the plaintiffs should get what they want in the way in which they want to get it. It appears to be the settled practice that the course sought to be taken by the plaintiffs cannot be allowed.

Appeal allowed.

Solicitors for defendant: *Chester & Co., for Weyman & Weyman.*

Solicitors for plaintiffs: *Turner & Hacon, for Cottam.*

(1) 29 Ch. D. 307.

E. L.

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July 1, 2.

[IN THE COURT OF APPEAL.]

CHAPMAN, MORSONS & CO. *v.* THE GUARDIANS OF THE AUCKLAND UNION.

Notice of Action—Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s* 264—*Action for Injunction—Damages in Substitution for Injunction—Chancery Amendment Act,* 1858 (21 & 22 *Vict. c* 27), *s.* 2.

Where an action against a sanitary authority was bonâ fide and in substance brought for an injunction to prevent them from causing a nuisance in the future by continuing to discharge sewage into a stream, but the judge at the trial thought that under the circumstances an injunction was not then needed, because, though a nuisance was caused by such discharge of sewage in an exceptionally dry season, which at the time of the trial had passed away, it was not likely to recur except in such a season, and he accordingly refused an injunction, but gave 25*l.* damages:—

Held, that he had power to give such damages in substitution for an injunction in accordance with the Chancery Practice under Lord Cairns' Act, though no notice of action had been given as required by s. 264 of the Public Health Act, 1875.

APPEAL from the judgment of A. L. Smith, J., at the trial without a jury.

The action, which was commenced in May, 1887, in the Chancery Division, was in respect of a nuisance to lands of the plaintiffs, alleged to be caused through the discharge of sewage into a stream by the defendants. The plaintiffs claimed an injunction and also 1200*l.* damages. No notice of action had been given by the plaintiffs. The case was tried at the Leeds Summer Assizes, 1888, and the facts as found by the learned judge at the trial were as follows. The defendants were a rural sanitary authority. Prior to 1856 the district was not very populous, and the sewage was carried by open ditches which found their way into the stream in question. Subsequently, certain sewers or drains were constructed, not by the defendants, which discharged into the stream. In 1872 the defendants became the rural sanitary authority, and the district then was rapidly becoming more populous. In 1876 the defendants altered to some extent the system of sewerage which then existed by joining a sewer which theretofore had flowed into the stream on

the left bank to a sewer which flowed into it on the right bank and carrying the conjoint sewer some distance along the right bank, and making it discharge the sewage into the stream at a point lower down than before, just above the plaintiffs' land. The learned judge was of opinion that the evidence did not establish the existence of any nuisance resulting from the operations of the defendants prior to the year 1887, but that the result of those operations was to render it likely that in exceptionally dry seasons a nuisance would be occasioned, and that in 1887, an exceptionally dry season occurring, a considerable nuisance was occasioned in the summer of that year. He further found that in 1888 there was no nuisance caused. Under those circumstances he was of opinion that, inasmuch as it was only in exceptionally dry seasons that any nuisance would be occasioned, he ought not to grant an injunction which might have serious results to the inhabitants of the district, but he gave 25*l.* damages instead.

Forbes, Q.C., and *Dunham*, for the defendants. The plaintiffs recovered judgment for 25*l.*, but the injunction was refused. Under those circumstances the judgment for 25*l.* cannot be sustained in the absence of notice of action. If the principal object of an action is an injunction, and damages are claimed by way of subsidiary relief, no notice of action is necessary: *Flower* v. *Local Board of Low Leyton* (1); but, when the injunction is refused, the damages cannot be ancillary, and the action must be treated as an action for damages only. Here a very large claim was made for damages extending over many years, and there was, as the result shews, no case for an injunction. It is contended that under these circumstances the action must be considered as substantially a common law action for damages. The cases, which have decided that no notice of action is necessary where the action is for an injunction, are cases either where the question arose on demurrer, and the right to an injunction was assumed, or else where an injunction was granted. As soon as it is decided that there is no right to an injunction, the action becomes an action for damages, and notice of action is necessary. They also

(1) 5 Ch. D. 347.

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cited *Bateman* v. *Poplar District Board of Works* (1), and *Sellors* v. *Matlock Bath Local Board.* (2)

E. Tindal Atkinson, Q.C., and *Manisty*, for the plaintiffs. In this case the action was bonâ fide brought for an injunction to obtain protection against a continuance of the nuisance, and it has been decided that where that is so notice of action is not necessary: *Flower* v. *Local Board of Low Leyton.* (3) In such a case the action is not brought merely to recover compensation for past infringement of a right, but for the protection of the plaintiffs' rights which are threatened with infringement in the future. The judge at the trial thought that under the circumstances the plaintiffs' rights could be sufficiently protected in the future without an injunction, and therefore gave damages in substitution for an injunction; but notice of action is not a condition precedent to his power to exercise the jurisdiction which a Court of Equity had, when a suit was brought for an injunction, under Lord Cairns' Act to substitute damages for an injunction. (4)

Forbes, Q.C., in reply.

LORD ESHER, M.R. In this case the action is brought by the plaintiffs against a rural sanitary authority for an alleged nuisance occasioned by the defendants' sewage works, and the claim is both for an injunction and for damages. The judge at the trial has found as a fact that the defendants by what they did caused a concentration of sewage near the plaintiffs' property which had not existed before and which did cause a nuisance to such property; but he has found that no appreciable nuisance was

(1) 33 Ch. D. 360.

(2) 14 Q. B. D. 928.

(3) 5 Ch. D. 347.

(4) There was a notice of contention by way of cross appeal by the plaintiffs against the refusal of the judge to grant an injunction, which the Court refused to allow, being of opinion that no substantial nuisance was being caused in the present, and that, if necessity arose, the plaintiffs could apply for an injunction under Order L., rule 12, without being obliged to bring a fresh action to establish their rights. It has been thought that cases with regard to the exercise of a discretion turning upon the particular circumstances of each case are not of much value as precedents, and therefore that the case did not call for a report so far as that point is concerned. Consequently so much of the arguments and judgments as related to the question whether an injunction ought to be granted is omitted.

occasioned to the plaintiffs except intermittently, that is to say, if in any year an extremely dry period occurred then a nuisance would be caused, but none would be caused in ordinary seasons. He found that in point of fact there was no evidence that what the defendants had done had caused any appreciable damage to the plaintiffs in any of the years between 1876 and 1887; but there being a very dry summer in the latter year the sewage became a nuisance. The learned judge, after hearing all the circumstances and coming to the conclusions I have stated, refused to grant an injunction, but found that the plaintiffs were entitled to damages to the extent of 25*l*. Thereupon it is said that the learned judge had no jurisdiction to give these damages, because the plaintiffs had not given a month's notice of action as required by the statute. Such an objection may be put in two forms: it may be said that, in the absence of a notice of action, the plaintiffs are not entitled to bring the action at all; and, secondly, it may be said that, though the action might be brought in respect of the claim of relief by way of injunction, yet the plaintiffs would not be entitled to maintain their judgment for damages without having given notice of action. On the other side it is said that the action was brought really for an injunction in the Chancery Division, just as an action would have been brought in Chancery for an injunction under the old system, and, an injunction being the substantial or chief remedy asked for, no notice of action was required; that an enactment requiring such notice did not apply to a suit in the Court of Chancery for an injunction before the Judicature Acts and does not apply now to an action brought for an injunction in whatever division it may be brought. It must be admitted that such a provision did not apply to a Chancery suit before Lord Cairns' Act, where the only relief asked for or which could be given was by way of injunction. Then did it apply where a suit for an injunction was brought in the Court of Chancery after Lord Cairns' Act? It seems to me equally clear that it did not. In cases where a suit for an injunction lay in Chancery damages would be recoverable at common law, and in many cases the Court of Chancery would not grant an injunction till the right to damages had first been established by an action at law. Lord Cairns' Act was passed to meet that difficulty, and

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was one of those enactments that have from time to time been passed to prevent the necessity for double proceedings. It was intended to obviate the necessity for going to a common law court for damages and then to the Court of Chancery for an injunction, and to enable the Court of Chancery itself to determine the right to damages and then give an injunction. But the Act went further than that and gave the Court of Chancery power to give damages in substitution for an injunction. I take it that the view expressed by Fry, L.J., in *Fritz* v. *Hobson* (1) is correct, viz., that the Act gave the Court of Chancery power not only to give damages in respect of the past injury, but to give them alternatively instead of an injunction, and therefore in respect of damage which was prospective when the writ issued. Where that existed, and the action was in Chancery for an injunction, I do not think that the provision with regard to notice of action was applicable. If it had been applicable, this strange effect would have been produced. The absence of notice could not prevent the maintenance of the action, for it is admitted that the provision could not apply to the action for an injunction, but it would cripple the powers of the Court as to the remedy to be applied. I never heard of such a thing as a provision with regard to notice of action, which had the very strange effect, not of preventing the action being brought without notice, but, when the action had been brought and tried, and all that remained to be done was to pronounce judgment, of crippling the Court's power of judgment as to the appropriate remedy to be applied. For these reasons I do not think that such a provision prevented the Court of Chancery from giving damages where they were given as an alternative remedy instead of an injunction, although no notice of action had been given. Now legal procedure is regulated by the Judicature Acts, and any relief may be given in either division. What then is the effect of the present system in such a case as this? As I have before tried to explain, I do not think that the Judicature Act has invented a new hybrid form of action, which is partly a Chancery suit and partly a common law action. All that has been done is to provide that forms of action which before could only have been brought in Chancery or at common law, as

(1) 14 Ch. D. 542.

the case might be, shall now be maintainable in either division of the High Court. There may be what is the equivalent of the old Chancery suit, with all its incidents and rights of relief, and before the same judge, there may be a common law action with its incidents and remedies, but there cannot be a form of action which is partly a Chancery suit for an injunction, and partly a common law action for damages. If there could be I should say, so far as the action for damages at common law is concerned, that notice of action would be necessary under the statute, but I think, where there is an action for an injunction, there would still be incident thereto the power given by Lord Cairns' Act to give damages in substitution for such injunction. It is true that Lord Cairns' Act has been repealed since the passing of the Judicature Acts by 46 & 47 Vict. c. 49, s. 3, but I am confident that the repeal was not with the intention of taking away any of the powers given by the Act in a Chancery action, but because it was considered that the Judicature Acts re-enacted those powers, and therefore that Lord Cairns' Act had become obsolete, and might be repealed. The result is, as it seems to me, that there may still be the equivalent of the old Chancery suit for an injunction, and in that action damages may be given as before the Judicature Acts in substitution for an injunction; and there may also be a distinct cause of action for damages. As both forms of action may be brought in either division of the court, it is necessary, for the purposes of the question we are dealing with, to consider what is the real character of this particular action. Is it an action brought, like the old Chancery suit, for an injunction, or is it merely a common law action for damages? Considering the nature of the wrong complained of, the division in which the action was brought, the form of the claim, and the circumstances of the particular case, I think it clear that this action was brought as a Chancery action for an injunction, to which would be incident the power to give damages as an alternative instead of an injunction. If that is so, it must be held that the enactment which requires notice of action does not apply to these damages, and therefore that the defendants' objection fails, and the appeal must be dismissed.

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LINDLEY, L.J. The plaintiffs in this case asked for an injunction and also for damages. The statement of defence sets up the fact that no notice of action was given as required by the Public Health Act. The learned judge who tried the case found that the alterations made by the defendants in the sewerage of the district in 1876 had the effect of causing a nuisance in an exceptionally dry season, but not at other times: and he said in substance that under those circumstances he did not think that an injunction was necessary for the adequate protection of the plaintiffs, but, as they had suffered damage through what had been done in an exceptionally dry season he awarded a sum of 25*l.* in respect of that damage. It is impossible to hold that he had no jurisdiction to grant an injunction; he had jurisdiction to grant an injunction either with or without damages; and he had also jurisdiction to award damages and not to grant any injunction.

With regard to the absence of notice of action, the short point seems to me to be whether this is really an action for an injunction, or an action for damages. If it were really and in substance a common law action for damages, then, though an injunction were asked for as well, notice of action would be necessary; but, if it were substantially an action for an injunction, then notice of action would not be necessary. As the Master of the Rolls has pointed out, if notice of action were necessary, as was contended for the defendants, the effect would be to take away in the case of an action for an injunction the power to award damages given to the Court by Lord Cairns' Act. I think that on principle that cannot be the correct view. Lord Cairns' Act is repealed; but the power conferred by it is still preserved. The provision of the former Public Health Act as to notice of action clearly did not apply to a Chancery suit for an injunction. A difficulty no doubt arose when Lord Cairns' Act gave power to give damages in such a suit. It is true, as was said in argument, that the precise point before us is not covered by authority, because in *Flower* v. *Local Board of Low Leyton* (1) the question arose on demurrer to the defence, and all the Court of

(1) 5 Ch. D. 347.

Appeal held was that the demurrer was good, and that the plaintiff would be entitled to some relief if he proved his case. What relief he would be entitled to was not decided. But when I consider that the consequences of holding the defendants' contention good would be in such cases as these to paralyze the exercise of the jurisdiction given by Lord Cairns' Act, I cannot but think that we are really following the principle of that decision in holding that notice of action was not necessary, and that it was competent to the judge in this action to give the damages which he gave, though no such notice was given.

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BOWEN, L.J. In this case the plaintiffs claimed an injunction and 1200*l.* damages. The judge who tried the action, in the exercise of his discretion, declined to grant an injunction, but gave to the plaintiffs 25*l.* damages. Thereupon a somewhat curious point arises. The defendants say that the judgment for 25*l.* damages cannot be sustained, because no notice of action was given by the plaintiffs. It appears to me, with regard to this point, that, when once certain facts are rightly apprehended, the case becomes very clear. In 1876 the defendants did something which was calculated to produce, and did produce legal damage in an exceptionally dry season, but no such season appears to have occurred until 1887. In that year, when a very dry season was imminent, the plaintiffs brought this action, claiming two kinds of relief, viz. an injunction against the mischief that was happening, and appeared likely to happen in the future, and 1200*l.* damages, of which I suppose a great portion at any rate was claimed in respect of damage in the past. So far as concerned the year 1887 it is very material to observe that what the plaintiffs were asking for was an injunction to prevent repetition of the grievances complained of in the future in a season of drought, which then appeared to be imminent. That season of drought came to an end, and the action came on for trial long after the danger had passed away; and when the trial took place, the learned judge, finding that the danger had passed away, thought that it was not necessary, under all the circumstances, to grant an injunction. With regard to the claim for damages for the past, if any were really put forward, it appears

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to me that he thought that there was nothing in it, and gave no damages for the past. But he gave damages in respect of what took place in 1887 to the amount of 25*l*. On the whole, the result of the facts, as found by the learned judge, seems to me to be as follows. The action was brought for an injunction, and was reasonably so brought, because in a year of drought there was danger of a serious nuisance; but, though the remedy so claimed was, when legal proceedings were first instituted, reasonably claimed in respect of an apprehended danger, at the time when the case came on for trial the danger had passed away, and the judge thought that an injunction was no longer needed, and gave damages: but those damages were not, as it appears to me, given for damage in past years, which had accrued when the writ was issued, but were given in respect of damage in 1887, which had not accrued when the writ issued, and in substitution for the injunction claimed by the plaintiffs, which was no longer wanted, though reasonably claimed at first in respect of a danger which had since passed away. On that state of facts, it is contended that notice of action was necessary in order to maintain the damages given by the judge. In dealing with this point, it is an essential fact that the damages were given, not in respect of a claim for damages for what had been done when the writ was issued, but in substitution for the injunction claimed. The question is how far the 264th section of the Public Health Act applies to a claim of an injunction to protect a plaintiff from future damage, and how far it can have the effect of crippling the power of a judge to award damages in substitution for such an injunction. Sect. 264 of the Public Health Act, 1875, is merely a re-enactment of a provision of a kind previously familiar to the profession and which had existed long before the Judicature Acts. Having regard to the words of the section which begins "a writ or process shall not be served out," and to the fact that it never seems to have been supposed that a claim for an injunction was within such a provision, as appears from the case of *Attorney General* v. *Hackney Local Board* (1), I should be inclined to think that "process" originally was only meant to apply to legal process; but I do not propose to express a

(1) Law Rep. 20 Eq. 626.

confident opinion as to that question. It is not necessary to do so, because I feel certain that, when the words of the section are looked at, it clearly applies to things past, and not to prospective claims for protection in the future. The language is, "a suit or process shall not be sued out against or served on any local authority for anything done or intended to be done," by which is meant not a thing intended to be done in the future, but which, at the time of doing it, is supposed to be done under the provisions of the Act. It appears to me that these words were not meant to touch proceedings the object of which is to obtain protection for the future. The reason of the thing seems to me to point in the same direction. What is the object of an injunction? It is to prevent the continuance or repetition of acts which have been done and which the defendants are threatening to continue or repeat. It is essential to the claim to shew that there is a threatening of damage or infringement of legal right in the future. The principle on which such a provision as that in question has been held not to apply to a claim for an injunction is clearly pointed out by Bacon, V.C., in *Attorney General* v. *Hackney Local Board* (1), and by Malins, V.C., and the late Master of the Rolls in *Flower* v. *Local Board of Low Leyton.* (2) It is obvious that, if this section were allowed to paralyze the operation of the remedy by injunction, a man would have to sit still while his property was threatened with manifest, immediate, and, in many cases it might be, irreparable injury. It being thus clear that this section does not apply where protection is sought for the future, what has a judge to do when he is called upon to deal with a case where such protection is sought, but there is also involved a claim of damage in respect of the past? So far as the action is in respect of a claim for damages in the past, to allow such damages to be given in the absence of notice of action appears to me to be a breach of the provisions of an Act of Parliament which is intended to throw a shield over public bodies such as this local board in respect of claims for damages for what is past. As to the claim for future protection I think a judge would have to consider whether the action is really brought for the purpose of obtaining an injunction, and, if so, he has further to

(1) Law Rep. 20 Eq. 626. (2) 5 Ch. D. 347.

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consider whether the plaintiff can be adequately protected without an injunction. He must look for one purpose to the state of things at the time when he is giving judgment, for the other to the moment of time when the action was brought. He must look to the existing state of things to see whether protection by injunction is then needed, and if not he will not grant an injunction; but he must also look to the initial stage of the action to see whether, when it was brought, a bonâ fide claim for an injunction existed. If he comes to the conclusion that, though there was a bonâ fide claim for an injunction at the time when the action was brought, an injunction is not necessary and that damages are an adequate relief in substitution for an injunction, he may give such damages. The question which the judge must consider in order to determine whether notice of action is necessary is whether the real object of the action is protection for the future, or merely damages for the past.

The learned judge in the present case seems in effect to have disposed of the case upon the principles which I have mentioned. He appears to me to have declined to grant an injunction because he thought that, under the circumstances, the plaintiffs would be adequately protected in the future without one; and he has not felt himself prevented from giving the damages he has given, by reason of there having been no notice of action. Why? Because the damages so given by him were given in substitution for an injunction, and to afford complete relief in respect of a part of the action, the object of which was not the recovery of damages for the past but protection for the future.

For these reasons, I am of opinion that the appeal fails.

Appeal dismissed.

Solicitors for plaintiffs: *Field, Roscoe, & Co., for Maw & Peale.*

Solicitors for defendants: *Iliffe, Henley, & Sweet, for T. M. Barron.*

E. L.

[IN THE COURT OF APPEAL.]

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July 13, 15, 16.

THE QUEEN *v.* BARNARDO.

Habeas Corpus—Return—Excuse for Non-compliance with Writ—Contempt—Practice—Attachment—Appeal—"Criminal Cause or Matter"—Judicature Act, 1873, *s.* 47.

To a writ of habeas corpus issued at the instance of the parent of a child, which had been wrongfully detained by the defendant, a return was made by the defendant to the effect that, as he had, before the issuing of the writ, parted with the custody of the child so detained by him to another person who had taken her out of the jurisdiction, it was impossible for him to obey the writ:—

Held, that it was no excuse for non-compliance with the writ that the defendant had wrongfully handed over the child to another person, and, therefore, that the return was bad, and an attachment must issue against the defendant for disobedience to the writ.

An appeal lies to the Court of Appeal against an order for an attachment for disobedience to a writ of habeas corpus.

APPEAL from the order of the Queen's Bench Division (Mathew and Grantham, JJ.) quashing a return to a habeas corpus and granting an attachment against the defendant for contempt.

The facts so far as necessary to raise the points of law reported may be stated briefly as follows.

The writ had been issued in respect of a female child named Tye, aged thirteen years. The mother of the child, being then a widow, had in July, 1888, given the custody of the child to the defendant under an agreement by which the defendant was authorized to place her in one of the homes established by him for destitute children, and subsequently in a situation in the United Kingdom or one of the colonies. The mother having subsequently married was desirous of having her child back, and a letter was written by the mother and stepfather on December 14, 1888, stating that they wished the child returned, which came to the knowledge of the defendant. Nevertheless, on December 22 the defendant handed over the child to a Madame Rômand with the intention that that lady should take the child on the continent in the first instance, and afterwards to Canada. The child had in consequence been taken out of the country. On

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January 22, 1889, a writ of habeas corpus was issued on the application of the mother and her husband, by order of a judge at chambers, directing the defendant to produce the child. The judge at chambers subsequently gave the defendant till April 30 to produce the child, but on that day she was not produced. The defendant made a return to the writ setting out the facts, the substance of which return was that the child having before the issue of the writ been handed over by him to Madame Rômand under the agreement made between him and the mother to be taken to Canada was no longer in his custody or control, and that Madame Rômand refused to give her up, and she was without the jurisdiction, so that it was impossible for him to obey the writ. A motion being made to attach the defendant for disobedience to the writ on the ground that the return was evasive and illusory and consequently insufficient, the Divisional Court made the order appealed against.

Poland, Q.C., and *Joseph Walton* (*St. John Clerke*, and *Lankester*, with them), for the prosecutors, took the preliminary objection that there was no right of appeal.

The order appealed from is a "judgment in a criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and therefore no appeal lies. The order for attachment was made because of the defendant's disobedience to the writ of habeas corpus. Disobedience to the Queen's writ is a crime at common law: Hawkins' Pleas of the Crown, vol. 1, book 1, c. 22, s. (4), where it is said, "It is also a high crime to disobey the king's lawful commands or prohibitions; as by obstinately refusing obedience to his writs." Contempt of Court is also treated as a crime in Stephen's Commentaries, 9th ed., vol. 4, pp. 338 and seq. It may not be the practice to indict for such an offence, but it would be indictable. The practice is for the Court to deal with the matter summarily. The imprisonment in such a case is inflicted by way of punishment for an offence.

[LORD ESHER, M.R. The Court has no power to release a criminal. How long would the offender be kept in prison?]

The Court pronounces a definite sentence. There is such a thing as a criminal contempt of Court. In *Long Wellesley's*

Case (1) it was held that privilege of Parliament is no protection against an attachment for any contempt which is of a criminal and not of a civil kind, and that the clandestine removal of a ward of Court from the custody of the person with whom the ward has been residing under the authority of the Court is a criminal contempt. In *Reg.* v. *Jordan* (2), where a solicitor had been committed by the judge of a county court for an insult to the judge in court, Lindley, L.J., expressed a doubt whether there was any right of appeal.

[LORD ESHER, M.R., referred to *Martin's Case.* (3)]

Rex v. *Earl Ferrers* (4) and *In re Gent* (5) are also authorities that privilege of Parliament is no protection against attachment of a punitive character. In *In re Freston* (6) this Court held that no privilege from arrest could be claimed by a solicitor against the execution of an attachment in respect of a contempt of a criminal nature, the contempt in that case being disobedience of an order for the payment of money made against the solicitor as an officer of the Court. The right of appeal is limited in the same way as privilege of Parliament is limited. In *Ex parte Alice Woodhall* (7), Lord Esher, M.R., said (at p. 835): "The result of all the decided cases is to shew that the words 'criminal cause or matter' in s. 47 should receive the widest possible interpretation The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this Court being constituted for the hearing of appeals in civil causes and matters." Accordingly in that case, the Queen's Bench Division having refused an application for a habeas corpus made by a person who had been committed to prison under the Extradition Act, 1870, as a fugitive criminal accused of an extradition crime, it was held by this Court that by virtue of s. 47, no appeal lay to this Court. Sect. 47 is not confined to indictable offences, it extends to all causes or matters which are in their nature criminal, such as a criminal contempt of Court. A crime is an act which can be punished by the law. Here the contempt has been dealt with as

(1) 2 Russ. & My. 639.
(2) 36 W. R. 797.
(3) 2 Russ. & My. 674, n.
(4) 1 Burr. 631.
(5) 40 Ch. D. 190.
(6) 11 Q. B. D. 552.
(7) 20 Q. B. D. 832

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a "criminal matter." Instances of the construction which the Court has given to the words "criminal cause or matter" are to be found in *Reg.* v. *Whitchurch* (1); *Mellor* v *Denham.* (2) The procedure in "attachment for contempt" is now regulated by rules 261–276 of the Crown Office Rules, 1886. An order for the issue of the attachment is in the nature of a conviction. It is the first step in a criminal proceeding; the present appeal is brought against the conviction. Rule 271 speaks of the Court pronouncing "sentence" on a defendant who is reported in contempt; could there be an appeal against the "sentence?"

[*Cock, Q.C.*, for the defendant, at the request of the Court, referred to *Ex parte Bell Cox* (3); *Ex parte Alice Woodhall* (4); *In re Johnson* (5); *In re Strong* (6) and *Witt* v. *Corcoran* (7).]

[He was then stopped by the Court.]

Poland, Q.C., in reply.

LORD ESHER, M.R. In my opinion an appeal lies, and for this reason, that an order for the issue of an attachment which is made to enforce the doing of something, the not doing of which is not criminal, is not a "judgment in a criminal cause or matter" within s. 47.

COTTON, L.J. The question is, whether the order appealed from was made "in any criminal cause or matter" within s. 47? Sect. 47 does not mean that no appeal shall lie when the act which originates the proceeding in which the order was made is a crime, but it means that no appeal shall lie when the cause or matter in which the order was made is in the nature of a criminal proceeding. In *Ex parte Bell Cox* (3) it was held that an appeal lay from the granting of a habeas corpus because the proceeding in which it was granted was a civil proceeding. In *Ex parte Alice Woodhall* (4) it was held that the refusal of a habeas corpus could not be appealed from, because the refusal was in a criminal proceeding. This shews the distinction. In my opinion the question is, not whether the act which is said

(1) 7 Q. B. D. 534.
(2) 5 Q. B. D. 467.
(3) 20 Q. B. D. 1.
(4) 20 Q. B. D. 832.
(5) 20 Q. B. D. 68.
(6) 32 Ch. D. 342.
(7) 2 Ch. D. 69.

to have been done by Dr. Barnardo was one for which he was liable to be indicted, but whether the proceeding in which the order was made was a "criminal cause or matter." It has been conceded that an appeal would lie against the granting of the habeas corpus, and that, I think, shews that the proceeding is not a "criminal cause or matter."

LINDLEY, L.J. I am of the same opinion. I will not stop to consider whether the passage which has been quoted from Hawkins's Pleas of the Crown is right or wrong now. We must look at the substance of the matter. The object of the attachment is to enforce the delivery up of the child. The appeal is from an order quashing the return to the habeas corpus and directing the issue of an attachment. That is a civil, not a criminal, matter, and s. 47 does not apply.

W. L. C.

Cock, Q.C., and *W. Baker*, for the defendant. At the time when the defendant parted with the custody of the child, no legal proceedings were pending to compel the restoration of the child. There cannot be a contempt by reason of something done before the writ of habeas corpus was issued. Then the parting with the child not being a contempt, the return states a sufficient excuse for non-obedience to the command to produce the child, by shewing that it is impossible to do so, such child not being in the defendant's custody or control, and being out of the jurisdiction. [They cited *In re Matthews* (1); *Reg.* v. *Roberts.* (2) (3)]

(1) 12 Ir. Com. Law Rep. (N.S.) 233.

(2) 2 F. & F. 272.

(3) The point was discussed whether, if the defendant had parted with the custody of the child in anticipation of legal proceedings with a view to evading and thwarting the exercise of the jurisdiction of the Court, and in consequence was unable to produce the child in obedience to the writ, such conduct would amount to a disobedience of the writ and contempt. The defendant in his affidavits had negatived the suggestion that he had sent the child away in anticipation of and to evade legal proceedings, and, as will be seen, the Court ultimately thought it unnecessary to deal with that point, being of opinion that the return was insufficient on more general grounds. The affidavits filed on the motion to attach the defendant set forth in detail the facts in relation to the history of the case, and the motives and views with which the defendant had retained possession of the child as he contended for her welfare and protec-

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Poland, Q.C., and *Joseph Walton* (*St. John Clerke*, and *Lankester*, with him), for the prosecutors. The only question is whether the return shews a sufficient reason for not obeying the writ. There has been no appeal against the order for a habeas corpus. The defendant had the custody of the child lawfully in the first instance, but, as soon as the mother required the return of the child, and he became aware of it, his possession of the child became wrongful and unlawful. It is not a good return for him to say that he cannot obey the writ and produce the child, because, being unlawfully in possession of the child, he unlawfully delivered the child to a person to take it out of the jurisdiction of the English Courts.

[They were then stopped by the Court.]

W. Baker, for the defendant, did not reply.

LORD ESHER, M.R. In this case the question is whether the defendant, however benevolent his motives may have been, has not acted in contravention of the law. It seems clear that the mother of the child, whether she would have a right to do so after her marriage it is not necessary to decide, agreed with the defendant that he should take the child and keep her, and do the best he could for her, and eventually place her in a situation either in this country or the colonies. If, whilst that authority continued, he had sent the child to a colony, and the mother had afterwards demanded the child back again, when he no longer had the custody of the child, but had parted with it by her authority, I think it could not be said that it was his duty to return the child. But I think that the parent of a child, whether father or mother, cannot get rid of his or her parental right irrevocably by such an agreement, and therefore, if the parent revoked the agreement, before it had been acted on by handing

tion; as also correspondence between him and Madame Rômand as to the return of the child. The case was argued at great length with regard to the question whether, on the facts so stated, the Court would treat the non-production of the child as a contempt, and whether it was really impossible for the defendant to produce the child or not. It has been thought, however, to be rendered unnecessary, by the grounds on which the judgment is rested, to state the facts or arguments further than so far as they were material to the point actually decided.

the child over to some one else, it would not be binding, and, as soon as the agreement was revoked, the authority to deal with the child would be at end. Therefore, if, before the defendant handed the child over to some one else in accordance with the agreement, the parent demanded the child back again, he would have no right to keep the child, but would be bound to return it to the parent. It follows that, when the mother and step-father demanded the child back again on December 14, the child being then in the custody of the defendant, his servants or agents, he was bound then and there to accede to this demand, and give back the child, and, when he refused to do so, the child was from that moment wrongfully in his custody, and he was acting unlawfully in withholding the child from the parent who was entitled to the custody of it. That being the state of things from December 14, a writ of habeas corpus was ordered to issue, and was issued on January 22. That writ commanded the defendant to have the body of the child before a judge in chambers at the Royal Courts of Justice immediately after the receipt of the writ, together with the cause of her being taken and detained. That is a command to bring the child before the judge and must be obeyed, unless some lawful reason can be shewn to excuse the non-production of the child. If it could be shewn that by reason of his having lawfully parted with the possession of the child before the issuing of the writ, the defendant had no longer power to produce the child, that might be an answer; but in the absence of any lawful reason he is bound to produce the child, and, if he does not, he is in contempt of the Court for not obeying the writ without lawful excuse. Vain efforts have been made in argument to shift the question of contempt to some anterior period for the purpose of shewing that what was done at some time prior to the writ cannot be a contempt. But the question is not as to what was done before the issue of the writ. The question is whether there has been a contempt in disobeying the writ after it was issued by not producing the child in obedience to its commands.

The writ having been issued, the judge at chambers, exercising a discretion which I suppose he had, gave time for obedience to the writ till April 30, but on that day the child was not produced.

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As the defendant did not then produce the child, it lay on him to shew that he had lawfully divested himself of the custody of the child, so as to excuse himself for not producing it. On December 14 the child was lawfully in his custody, but after that date it was in his custody contrary to law, because the child's natural guardians had demanded it, and he had not given it up to them. The child being so wrongfully in his custody, he gave it up to another person with a view to its being taken abroad and put in a situation in the colonies. In so doing he acted contrary to the law, because he acted without the authority of the parent who had demanded to have the child returned. When called upon by the writ to produce the child, he endeavours to excuse himself by saying in effect that, being wrongfully in possession of the child, he wrongfully handed her over to the possession of some one else, and, therefore, cannot return her. The question of law is in substance whether a person, who is bound to bring a child before the Court, can say by way of excuse, "I have wrongfully given up the child to some one else." In my opinion that is no valid excuse for not obeying the writ. Whether the person to whom he has handed over the child is within the jurisdiction or not, he must take the consequences, for it was his wrongful act which prevents him from obeying the writ. It seems to me that those considerations decide the case. It is suggested that he parted with the custody of the child knowing that in all probability legal proceedings were about to be taken, with a view to defeating them. I am not prepared to act on that suggestion, as he has sworn the contrary. With regard to the correspondence that has taken place between him and the person to whom he handed over the child, I do not think he has done all that he ought to have done to assist the Court in recovering the child. I do not come to the conclusion that he intended by his letters to suggest that the child should not be brought back, but I do not think his letters were calculated to bring about the restitution of the child. I think that the mere writing of such letters was not a sufficient performance of his duty in the matter. It was his wrongful act which put the child out of his custody, and he was bound to do much more than write letters. He ought to have made every possible effort to

get the child back, and have gone, if necessary, abroad and used all his personal influence for that purpose. For these reasons I think that the proceedings taken to compel him to obey the writ were rightly taken, and that the order made by the Court below was rightly made; and, therefore, that the appeal must be dismissed.

COTTON, L.J. This is an appeal against the order of the Divisional Court for an attachment for non-obedience to a writ of habeas corpus. The writ ordered the defendant to produce the child before a judge at chambers and state the reasons for her detention. Many of the points argued by the defendant's counsel might have been taken as reasons for the writ not being issued, but either they were not taken or upon discussion of them were overruled. The question now is, whether the writ has been obeyed. Clearly it has not, because the child has not been produced. The Master of the Rolls has given the defendant credit for intending to do the best he could for the welfare of the child, but he must not do that in disregard of the law. A Court of law is the judge of the matter, when the child is no longer lawfully in his possession, and he must obey the law and deliver up the child in order that the Court may decide what is proper to be done with regard to it. The defendant, however, has not produced the child in obedience to the writ, and he must shew a sufficient reason for not doing so. The question is whether he has done so. In my opinion he has not. The mother of the child had given him an authority with regard to the child, which, however, was put an end to on December 14. With knowledge that such authority was revoked, he handed over the custody of the child to a lady that it might be taken abroad. He had no authority or power thus to hand over the child when he handed it over, because his right to the custody of the child had then come to an end. Therefore he was still answerable to the Court, because he had not handed the custody of the child over to a person who could legally take it from him so as to discharge him from responsibility. Under these circumstances, what must he do to get the child back? He wrote certain letters to the person to whom he had handed over the child. I agree with the Master

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of the Rolls that those letters were not calculated to produce the required effect, though I will assume that they were intended to do so. He must take other and more effectual steps for the purpose. If necessary he must go abroad, and must take steps for enabling the mother to recover possession of the child according to the laws of the country where the child may be. We cannot now say that he has not committed a contempt for any reason now adduced by him. Various questions may have to be considered when he has answered interrogatories, and when we have to see whether he has purged his contempt. The considerations I have mentioned determine the case at the present stage. It is not necessary now to go into the question whether the defendant handed over the custody of this child with the intention that she might be removed out of the jurisdiction in order to defeat anticipated proceedings. That question may be very material when the Court has to consider whether the defendant has purged his contempt. The effect of the order at present is not that the defendant be committed, but that he answer interrogatories. I think that I ought to refer to the case of *In re Matthews.* (1) That case is not an authority binding on us, but, having regard to the judges by whom and the care with which it was decided, it is a valuable decision. The counsel for the defendant have, in my opinion, misconceived the effect of that case. It came before the Court in two different aspects. It came in the first instance before the Court on the question whether a contempt had been committed; secondly, on the question whether the contempt had been purged. The decision of the Court that a contempt had been committed is in accordance with the view we now take, viz. that, when the custody of a child is wrongfully handed over after the parent has demanded it back, such handing over of the child cannot discharge the defendant from responsibility; and therefore the non-production of the child in obedience to the writ is a contempt. But when interrogatories came to be answered, and the question was whether the contempt had been purged, the Court held that it had not been purged but rather aggravated, but they did not differ from the view that a contempt had been committed, because the defendant being unlawfully in possession

(1) 12 Ir. Com. Law Rep. (N.S.) 233.

of the child was not relieved of responsibility by handing it over to another person, and was still answerable for it. This case is a still stronger one, because the defendant handed over the child to another person at a time when he was no longer in lawful possession of it, knowing that that person would take the child out of the jurisdiction. For these reasons I agree that the appeal should be dismissed.

LINDLEY, L.J. This case appears to me very simple, if attention is paid to certain facts and dates. On July 5, 1888, an agreement was made between the mother of this child and the defendant to the effect that the child should be placed under his charge for a certain period, and that he should be at liberty to find her a situation in this country or the colonies. The defendant seems to have attached to that agreement an effect which, according to law, it cannot have. Notwithstanding such an agreement the parent would be the legal guardian of the child, and she is incapable of binding herself not to exercise her rights as such. She could therefore revoke the agreement at any moment, as could any other guardian in a similar case. On December 14, the agreement was revoked by a letter written by the parent, and it is admitted by the defendant that he knew of the letter so revoking it. Those facts are in my opinion all that is necessary to decide this case. From that moment the defendant's custody of the child was unlawful; he had no right to detain the child, still less to send it abroad against the will of the mother. On December 22 he placed the child in the hands of a lady in order that it might be taken abroad. Afterwards there was an application for a habeas corpus. I think all other matters of fact may be passed over. The question of law arises simply on those undisputed facts. As matter of law I think that it is no valid excuse for not producing a child or other person in obedience to a writ of habeas corpus to state inability to obey, if such inability is the result of the previous illegal conduct of the person to whom the writ is addressed. Here the defendant's inability arises from his having illegally sent the child abroad against the will of the lawful guardian; and that he did this before any legal proceedings against him were

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commenced is immaterial. Persons who illegally put a child out of their power do so at their peril, and, if they are ordered to produce the child, no excuse founded on their own inability to comply with the order will be held a sufficient answer to the writ. The Court will grant time for compliance with the writ, but will not accept the excuse. The Master of the Rolls, in my opinion, has not gone too far in saying that, if the defendant cannot get the child back in any other way, he must go after it himself, and assist the mother, if necessary, to recover it by legal process of the country where it is. The defendant may have acted honestly, but, if the principle we have laid down is correct in point of law, his motives and intentions are only material with reference to the course the Court ought to take having regard to his disobedience to the writ.

Appeal dismissed.

Solicitors for the prosecution: *Leathley & Phipson.*
Solicitors for defendant: *Nisbet & Daws.*

E. L.

June 27; *July* 13.

[IN THE COURT OF APPEAL.]

BECK *v.* PIERCE.

Husband and Wife—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 13–15—*Liability of Husband for Wife's ante-nuptial Debt—Judgment recovered against the Wife in respect of her Separate Estate—Action against Husband—Statute of Limitations.*

A judgment having been recovered by the plaintiff in an action brought against a married woman under the Married Women's Property Act, 1882, s. 13, for a debt incurred by her before marriage, but such judgment remaining unsatisfied because she had no separate estate, an action for the debt was afterwards brought by the plaintiff against the husband who had acquired property from his wife to an amount exceeding the debt:—

Held, that the judgment recovered against the wife was no defence to the action against the husband.

A husband cannot be made liable under the provisions of the Married Women's Property Act, 1882, ss. 14, 15, for an ante-nuptial debt of the wife which accrued due against the wife more than six years before the commencement of the action.

APPEAL from the judgment of Grantham, J., at the trial without a jury.

The action was by a solicitor in respect of charges incurred by the defendant's wife before the defendant's marriage with her. The defendant pleaded in his defence a judgment recovered against the wife for the same charges: and, as to a portion of the claim, that it had accrued more than six years before the commencement of the action.

The facts were as follows. The work, in respect of which the action was brought, had been done for the defendant's wife before her marriage: a portion of it was done more than six years before the commencement of the action, the remainder having been done since: all of it was done within six years before the defendant's marriage. The plaintiff had sued the defendant's wife after the marriage, and obtained judgment for the full amount of his bill against her in the usual form, payable out of her separate estate. There being no separate estate however, the judgment remained unsatisfied. The defendant was not made a party to that action. It was admitted that the defendant had acquired from his wife property exceeding in value the amount claimed. The learned judge, thinking that the doctrine of *King* v. *Hoare* (1) applied, and that the recovery of judgment against the wife barred the plaintiff's claim against the husband, gave judgment for the defendant.

June 27. *Henn Collins, Q.C.*, and *Clare*, for the plaintiff. The doctrine of *King* v. *Hoare* (1) is not applicable. The Married Women's Property Act, 1882, ss. 13–15, creates a separate and independent liability on the part of the husband. He is not liable jointly with the wife, but is independently liable to the extent of property acquired through or from his wife. The doctrine of *King* v. *Hoare* (1) depends on the right of one joint contractor to have his co-contractor made a co-defendant, which would be impossible where judgment had already been recovered against him. The Married Women's Property Act, 1882, s. 15, clearly implies that the action may be against the husband alone; and he could not claim to have the wife made a co-defendant. The judgment against the wife is not really on the same footing as an ordinary judgment against a feme sole but is

(1) 13 M. & W. 494.

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limited in its effects to her separate property; it does not create a judgment debt, and it cannot, therefore, operate to merge the husband's liability as in the case of a judgment against one of two co-contractors. The doctrine of *King* v. *Hoare* (1) has no application where there are joint and several liabilities. There is a several liability on the husband's part to the extent of assets derived from the wife. Under the old law the husband's liability was not a joint liability, but arose out of the unity of person merely. After the death of the wife he was not liable to be sued at all. Under the Married Women's Property Act, the death of the wife would not release him from his independent liability.

[They also cited on this point *Kendall* v. *Hamilton* (2); *Scott* v. *Morley* (3); *Downe* v. *Fletcher* (4); *Axford* v. *Reid* (5); *Draycott* v. *Harrison.* (6)]

With regard to the defence raised under the Statute of Limitations, if a debt of the wife were statute-barred at the date of the marriage, of course the husband could not be rendered liable, but, with regard to a debt not so barred, the liability of the husband since the Married Women's Property Act is a separate liability resulting from the wife's debt, the marriage, and the receipt of property through the wife. There is no cause of action against him till all these elements exist; and till then the statute cannot begin to run. The right of action here not accruing till the marriage it is not a good defence that six years had elapsed since the debt accrued dué against the wife.

[They cited on this point *Lowe* v. *Fox.* (7)]

Bigham, Q.C., and *Carver*, for the defendant. The provisions of the Married Women's Property Act with regard to the husband's liability for the wife's ante-nuptial debts were not intended to alter the general principles of the common law on the matter, except in one respect. At common law the husband was liable whether he got property with the wife or not. An earlier Act having by mistake abolished that liability, the present Act re-establishes it with a limitation, viz., that the liability shall not exceed the property derived from the wife. The liability of the

(1) 13 M. & W. 494.
(2) 4 App. Cas. 504.
(3) 20 Q. B. D. 120.
(4) 21 Q. B. D. 11.
(5) 22 Q. B. D. 548.
(6) 17 Q. B. D. 147.
(7) 15 Q. B. D. 667.

husband is still as at common law a liability jointly with the wife in the sense that it is a liability in respect of her debt, and, if her original debt has passed into a judgment, the husband cannot be sued. If the plaintiff elects to sue and recover judgment against the wife solely, he cannot afterwards sue the husband in respect of the debt, which is gone as against the wife. The husband may be sued alone no doubt in the first instance under the Act, but he would have a right to have his wife brought in. It is not a case of joint and several liability, for in that case there are joint and several contracts. In this case the husband is liable only in respect of his wife's contract. There was only one cause of action which is merged by the judgment against the wife. The husband was only liable in respect of the cause of action against the wife: the wife could not be sued now for that cause of action, judgment against her having been already recovered.

With regard to the defence under the Statute of Limitations, if the husband's liability still depends, as is contended, on the existence of the wife's liability, it follows that, where the liability of the wife is statute-barred, the liability of the husband is barred also. At common law the husband's liability arising out of and depending on that of the wife, it was clear that that was so. Under the statute, it may be true that the husband's liability does not arise till marriage, but the cause of action is the wife's debt, and his liability really depends on hers. [They cited *Hallett* v. *Hastings* (1).]

Henn Collins, Q.C., in reply.

Cur. adv. vult.

1889. July 13. The judgment of the Court (Lord Esher, M.R., Lindley and Bowen, L.JJ.) was delivered by

LINDLEY, L.J. The plaintiff is a solicitor, and he sues for payment of a bill of costs incurred by the defendant's wife before her marriage. About one half of the bill is for work done more than six years before the commencement of the action; the other half is for work done since; and all the work was done within six years before the defendant's marriage. After the marriage the plaintiff sued the wife, and obtained judgment

(1) 35 Ch. D. 94.

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against her for the full amount of the bill, but payable out of her separate estate. She has none, and the judgment is wholly unsatisfied. The defendant was not made a party to those proceedings. Two defences are relied upon, viz., first, the judgment recovered against the wife is said to be a defence to the whole action. Secondly, the Statute of Limitations is pleaded to so much of the plaintiff's claim as became due more than six years before the writ was issued. Both these defences require attention.

The Married Women's Property Act has materially altered the position of husbands and wives towards the creditors of wives. The rights of creditors of women who marry before they have paid their debts are totally different from what they were at common law.

At common law a husband was liable to such debts to the whole extent of his property, whether he knew of their existence or not, and whether he obtained any property from his wife or none. But he could not be sued alone for such debts, if his wife was alive: and he could not be sued at all for them after his wife's death (Co. Litt. 351 b; Com. Dig. Baron and Feme, Y and 2 C). Nor was a promise by him to pay such debts of any avail, if the only consideration for the promise was his pre-existing liability to pay them; (*Mitchinson* v. *Hewson* (1), where such a promise was averred.) Nor would a Court of Equity assist his wife's creditors against him, even if he had acquired property through her: *Heard* v. *Stanford* (2). If he and she were both sued, and judgment was recovered against both, such judgment could be enforced against the survivor. If judgment was recovered against her before her marriage, a sci. fa. lay against him and her after marriage, and, if judgment was obtained against them both on such sci. fa., and then she died, such judgment bound him. (*Obrian* v. *Ram.* (3)) But a judgment against her alone did not affect him after her death (Ibid.), except of course in his character of administrator.

The Married Women's Property Act (45 & 46 Vict. c. 75) has entirely altered the law as regards the liabilities of husbands

(1) 7 T. R. 348.

(2) 2 Eq. Ca. Ab. 134, pl. 5.

(3) 3 Mod. 186; and also cited in *Woodyer* v. *Gresham*, 1 Salk. 116.

for their wives' ante-nuptial debts. First, he can now be sued without her, and whether she be alive or dead: see s. 14, and the expression in s. 15, "if in any action brought against the husband alone." Secondly, he can be sued with her under s. 15, if the plaintiff seeks to establish his claim wholly or in part against both husband and wife; but in this case the judgments may be separate, although to the extent to which they are both liable, the judgment may be "a joint judgment against the husband personally, and against the wife as to her separate property." What the word "joint" means in this sentence is not clear. Having regard to ss. 13 and 14, it would be strange if on the death of husband or wife the survivor should alone be liable, if judgment against them both were obtained under s. 15. Thirdly, the husband's liability is no longer unlimited as at common law; it is limited to the value of his wife's property which he may have acquired: see s. 14. Fourthly, as between him and her he is entitled to be indemnified out of her separate property: see s. 13.

The husband's liability since the Married Women's Property Act is, as it was before, a liability in respect of his wife's contracts or torts, and not a liability in respect of his own contracts or torts; and, although he is not a surety, any defence open to her appears to be open to him also: for otherwise the creditor by suing the husband first would be able to obtain judgment against him and then he would be able to obtain indemnity against his wife; and in that way she could be made liable indirectly to a greater extent than she could be made liable directly. Such a result does not seem consistent with the Act nor with ordinary principles of justice. Such being the husband's liability, it cannot be regarded as a joint liability only; if sued alone he cannot require his wife to be joined; and, if she is sued alone in respect of her separate estate, she cannot require her husband to be joined: see s. 1, sub-s. 2, and s. 13. The cases therefore of *King* v. *Hoare* (1), and *Kendall* v. *Hamilton* (2), have no application to actions against husbands for their wives' ante-nuptial debts: and notwithstanding the judgment obtained by the present plaintiff against the defendant's wife, as

(1) 13 M. & W. 494. (2) 4 App. Cas. 504.

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that judgment is wholly unsatisfied, this action is clearly maintainable, except so far as it may be barred by the Statute of Limitations.

The husband's liability for his wife's ante-nuptial contracts first accrues on his marriage, unless he has previously done some act making him responsible for them. This proposition is self-evident, and is equally true whether his liability is imposed by common law or by statute. Perhaps, therefore, it might have been originally held that, as no right of action against him existed until marriage, the Statute of Limitations did not begin to run against him until the happening of the same event. But the cause of action in respect of which he is liable is his wife's contract, not his own, and the Statute of Limitations has always been regarded as beginning to run in his favour as well as his wife's from the time when the cause of action accrued against her; and any acknowledgment or part payment by her before marriage kept her debt alive both as against her and her after-taken husband; but similar acts by her after marriage were of no avail either against herself or as against her husband (*Pittam* v. *Foster* (1); *Neve* v. *Hollands.* (2)) The Statute of Limitations applies to debts payable by a married woman out of her separate estate (see *Hallett* v. *Hastings* (3)), and the Married Women's Property Act apparently enables a wife to keep alive her liabilities in respect of her separate estate by making an acknowledgment or by part payment, or by suffering judgment to be obtained against her; but such acts of hers do not, we apprehend, affect her husband. On the other hand, similar acts by him will not affect her direct liability to her creditors. Whether if he chooses to keep alive his liability, he can still claim the benefit of his right to indemnity under s. 13, is a question not necessary now to determine; but we can find nothing in the Married Women's Property Act to alter the cause of action of the plaintiff. The plaintiff's cause of action against the defendant is still founded on his wife's contract: and the plaintiff's cause of action is no more now the defendant's marriage than it was before the passing of the Act. Although the defendant's marriage is what

(1) 1 B. & C. 248. (2) 18 Q. B. 262.
(3) 35 Ch. D. 94.

makes him liable, there is no more reason now than there was before for saying that with reference to the Statute of Limitations the cause of action accrues against him on his marriage as distinguished from the time when it accrued against his wife. The Married Women's Property Act does not purport to amend or alter the law as regards the time within which actions must be commenced. The law in that respect is what it was. It was contended that the plaintiff's cause of action against the wife did not in fact accrue until all the work which the plaintiff did for her was wholly complete: and reliance was placed on *Whitehead* v. *Lord.* (1) This point was disposed of in the course of the argument. We cannot think that the reasoning in that case applies to miscellaneous work done by a solicitor for his client, although it may apply to such continuous work as bringing and prosecuting an action.

The defendant in this case can therefore avail himself of the Statute of Limitations as to so much of the plaintiff's demand as accrued to him against the defendant's wife more than six years before the commencement of the present action; but as to the rest the defendant is liable.

The appeal therefore will be allowed, and judgment be entered for the plaintiff for the amount sued for less 33*l.* 1*s.*, the amount barred by the statute.

Appeal allowed.

Solicitors for plaintiff: *Chester & Co., for Chapman, Roberts, & Beck.*

Solicitors for defendant: *Hamlin, Grammer, & Hamlin, for Brighouse, Brighouse, & Jones.*

(1) 7 Ex. 691.

E. L.

1889
June 25.

[IN THE COURT OF APPEAL.]

GOSLINGS & SHARPE, APPELLANTS; BLAKE (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Banker—Loan for less than a Year—Payment of Interest—Deduction of Income Tax—"Yearly interest of money or any annuity or other annual payment"—16 & 17 Vict. c. 34, s. 40.

Interest upon a loan by a banker to a customer for a period of less than a year is not within the words "any yearly interest of money or any annuity or other annual payment" in 16 & 17 Vict. c. 34, s. 40, and therefore the customer is not entitled to deduct income tax from such interest.

So *held*, reversing the decision of the Queen's Bench Division (22 Q. B. D. 153).

Bebb v. *Bunny* (1 K. & J. 216) distinguished.

APPEAL from a judgment of the Queen's Bench Division (reported 22 Q. B. D. 153).

Messrs. Goslings & Sharpe, bankers, appealed against an assessment made on them under Sched. D of the Income Tax Acts, to the Special Commissioners, who stated a case for the opinion of the Court.

From the profit and loss account of the firm for the three years 1883, 1884, and 1885, their profits were shewn to have been derived from "taxed" and "untaxed" sources. In respect of the "untaxed" profits, returns for the assessment to income tax had been made by the firm, based upon the average of the balances of profit shewn for the three years immediately preceding the year of assessment.

Since January 1, 1885, the firm had ceased to regard the interest received by them on loans to customers for periods of less than a year as forming a portion of the untaxed profits of the concern, and they consequently excluded it from their returns, but included the amounts in the aggregate of their taxed profits. This was in accordance with an arrangement entered into with their customers, by which, from that date, the firm had allowed income tax to be deducted from any interest paid to them on loans, whether the same were contracted for periods of less or more than one year.

The contention of the firm was, that in adopting this course

they were supported by the decision in the case of *Bebb* v. *Bunny* (1), in the head-note to which case it is said that "the words 'yearly interest' in s. 40 of 16 & 17 Vict. c. 34, mean, not only interest accruing de anno in annum, but any interest at a fixed rate per cent. per annum, though accruing de die in diem."

16 & 17 Vict. c. 34, s. 40, enacts: "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled, and is hereby authorized, on making such payment to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable . . . . and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable, and the person to whom such payment as aforesaid is to be made shall allow such deduction upon the receipt of the residue of such money, under pain of forfeiting the sum of fifty pounds for any refusal so to do."

The Special Commissioners, having regard to the decision in the case of *Mosse* v. *Salt* (2), confirmed the assessment.

The judgment of the Queen's Bench Division (3) reversed the decision of the Commissioners.

The respondent appealed.

Sir Edward Clarke, S.G., and *Dicey*, in support of the appeal. The provision as to the deduction applies to annual interest, and not to every case where interest is computed at an annual rate. If this were not so, the reference in the section to payments other than yearly would be without meaning. 5 & 6 Vict., sched. D., s. 102, deals with short loans, and shews that the scheme of the Act was that, where there is annual interest, the person who pays may deduct income tax; but where this is not the case, the receiver is

(1) 1 K. & J. 216. (2) 32 Beav. 269.
(3) 22 Q. B. D. 153.

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charged under sched. D. *Mosse* v. *Salt* (1) supports the argument for the Crown. The head-note of *Bebb* v. *Bunny* (2) is misleading, for the Vice-Chancellor (at p. 219), after saying that the expression "yearly" interest of money is susceptible of the view that it is interest reserved at a given rate per cent. per annum, qualifies this by adding, "or, at least, in the construction of this Act, I must hold that any interest which may be or become payable de anno in annum, though accruing de die in diem, is within the 40th section."

[They cited *Dinning* v. *Henderson.* (3)]

Finlay, Q.C., and *Pollard*, contra. Where there is interest at a yearly rate, the payer may deduct income tax. This appears from the section itself, for "rent" is certainly not primâ facie payable yearly, "yearly interest for money" may well mean interest at a yearly rate, and the words "annual payment" are connected only with the expression "annuity" which precedes them.

The Acts relating to income tax subsequent to that of 1842 omit the word "yearly," and only speak of "interest." 5 & 6 Vict. c. 35, sched. D., s. 102, is no longer in force, for it is only revived by s. 5 of the Act of 1853 so far as it is consistent with that Act.

Sir Edward Clarke, S.G., in reply.

LORD ESHER, M.R. The point which we have to decide in this case is as follows. Where a banker or any other man lends money for a specified time less than a year, to be repaid at that fixed time with the interest that has become due up to that time —whether, in such a case the banker or lender is bound to allow the borrower to deduct income tax from the interest which he has to pay. Now, it is that case, and that only, which was the subject matter of the judgment of the Queen's Bench Division and no other case is presented to us as matter for decision. The question then is whether such a case is within the terms of the 40th section of the Act of 1853.

I will deal with the matter first, as if that were the only

(1) 32 Beav. 269. (2) 1 K. & J. 216.
(3) 3 De G. & S. 702.

section under consideration, and try to construe that section according to ordinary grammatical and idiomatic language. "Every person who shall be liable to the payment of any rent." If that stood alone that might be rent for less than a year, but it is followed by "or any yearly interest of money or any annuity or other annual payment." Dealing with this according to ordinary English idiomatic language, I think that the word "other" obliges us to say that an annual payment is an instance of the same kind as those that have gone before, so that what have gone before are in the nature of annual payments, but besides those there are other annual payments which may be brought in. If that is so "any rent" becomes "any annual rent." "Any yearly interest of money" surely cannot be interest for less than a year in ordinary English, and there remain "any annuity," which is admitted to be an annual thing, and any "other annual payment." Those are the only cases in which the deduction allowed by the 40th section may be made from interest. Does the case which I have stated at first come within any of those? If it be a lending of money for a specified time less than a year then it is said that those who lend the money may charge interest upon it in several different forms. On a loan of 1000*l.* it might be said, "I will lend you 1000*l.* for three months, you to pay me back at the end of that three months 1000*l.* and 30*l.* more for the use of it." It is admitted that that is not annual interest; or, "I will lend you 1000*l.* for three months, to be paid back at the end of that three months, and on the same day you are to pay me interest on that sum at the rate of 12 per cent. per annum." Precisely the same sum would be paid in this case. That is "At the rate of 12 per cent. per annum for three months," is the mercantile mode of expressing, "You shall pay to me at the end of three months 1000*l.*, and also 30*l.* for interest." There is another case, "You shall pay me on that day 1000*l.* with interest at the rate of 12 per cent." That is another mercantile phrase which is a short phrase which everybody who understands business knows to mean and to be equivalent to "at 12 per cent. per annum." The words "per annum" are left out, but the effect is the same as if they were in, and it is precisely like the second case and so like the first.

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If that be so it is impossible to say that the interest is fixed with reference to its being paid at the end of a year.. It has nothing to do with a year. It is calculated upon and fixed by the fact that money is to be lent for three months, and not with reference to anything with regard to a year. Therefore in such a case as that, and that is the only case with which we have to deal to-day, I am of opinion that the case is not within the meaning of the 40th section of the Act of 1853. I say so even if I had to construe s. 40 without there having been any previous Act of Parliament at all, and I think the only value of the reference to the former Acts is to shew that the view urged on behalf of the Government is correct, and that when the legislature intended to deal with interest payable for a term less than a year they so expressed themselves. It seems to me that, unless it be in the case of *Dinning* v. *Henderson* (1), every judge who has dealt with this section has come to the same conclusion, even including Wood, V.C. But supposing that he thought otherwise, I do not think that his decision in *Bebb* v. *Bunny* (2) governs the present case. He was dealing with the case of purchase-money, while sitting in the Court of Chancery, and I take it that, according to the law as administered there, although it is true to say that sometimes by the terms of the mortgage the money is made payable on a fixed day, and the interest also, yet that, even in that case, in the Court of Chancery, the construction of such an instrument is that if the money is not paid on that fixed day the interest is to go on. I do not at all admit that ordinary mortgages are in such a form. I take it the ordinary form of mortgage has in it the term that if the money is not paid on the fixed day the interest shall go on; and in that case it is clear that the payment of the interest may go on for more than a year. We are here asked to deal with a case where by the contract the payment of interest is to be on a fixed day, and where there is no law which, without a new contract by the parties, says that the interest is payable as a matter of right beyond that, I think therefore that we need not say but that the case before Wood, V.C., was well decided. I confess to considerable doubt about the case of *Dinning* v. *Henderson*. (1) I

(1) 3 De G. & S. 702. (2) 1 K. & J. 216.

think that may be dealt with in two ways. I rather incline to think from what I have said that the bills of exchange dealt with in the master's office were bills of exchange bearing interest on the face of them; and if a bill of exchange or promissory note is, on the face of it, made to bear interest, then that interest runs on till payment, and therefore might run on over the year. But if it be suggested that in the master's office they dealt the same way with the bill of exchange or promissory note which did not carry interest on the face of it, then I think we must say that there sprung up in the Court in administering an estate a view that the Court was collecting the income tax for the Government. I do not think it necessary to say that we definitely overrule *Dinning* v. *Henderson* (1), though I must say that if it is applied to bills of exchange which do not carry interest on the face of them, I doubt the correctness of the decision and if it came before us on a specific case I should take leave to consider what ought to be done. In the present case there is no such practice before us as that which is dealt with by the Court or its officers in *Dinning* v. *Henderson* (1), and there is nothing in my mind which can bring this case within any of the words used in the beginning of s. 40. I must go further and say that the result of what would happen if the section were applied as is suggested to such mercantile transactions as go on in the city of London every day would be in my opinion to make the business which it is the object of these Acts to deal with impossible. That a man who borrows money for twenty-four hours should be allowed to deduct the income tax in respect of such a loan, would, it seems to me, in the multitude of transactions which take place in the City every day, render business impossible, and render the Government utterly helpless with regard to the tax. I cannot think that that was the intention of the Act of Parliament or of the legislature. I agree with the view the Lord Chief Justice and Manisty, J., expressed of the Act, but I think that they were not obliged to give way to the practice to which they did give way, because even if that practice be a good one it was not applicable to the case before us. I think this appeal must be allowed.

(1) 3 De G. & S. 702.

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LINDLEY, L.J. I am of the same opinion.

The question is one of considerable difficulty, turning upon the meaning of the expression "annual interest." The difficulty is not lessened by the circumstance that most mortgages are loans for six months. The ordinary form of mortgage contains a covenant to repay the loan in six months, and if not then paid a covenant to pay interest until the loan is repaid. Those are short loans; but in fact, as men of business, we know perfectly well that, except in exceptional cases, money lent on mortgages is very seldom repaid at the end of six months, the mortgagee usually being content with his security and receiving his interest half-yearly. If insurance offices, or other mortgagees, were to call in their money at the end of six months without some special reason, every one would think they were acting in a very oppressive way. In point of business, therefore, a mortgage is not a short loan; but a banker's loan at three months is a totally different thing. That is a short loan, it is intended and understood to be a short loan, and the difference in practice between the two is perfectly well known to every business man. Now what we are dealing with here are short loans by bankers. We have nothing to do with the practice of the Court of Chancery as to the mode in which it pays the creditors against an estate, on a bill of exchange, or otherwise. We have nothing to do with the practice between vendors and purchasers. The practice, as I understand it, is that if the purchaser has to pay the principal and interest into Court, he must pay it in full; and if the purchaser has to pay the vendor the purchaser deducts the income tax. That has no bearing on what we have to consider, that is to say, what is the true meaning of this Act of Parliament as applied to short loans by bankers. It appears to me, for the reasons given by the Master of the Rolls, that the contention of the Board of Inland Revenue is right. I am specially struck with passages in various parts of these Acts which have to be construed. I am struck with the distinction which is drawn, not everywhere, but here and there, between "interest" and "annual interest," and it appears to me that, notwithstanding the authorities, none of them being actually in point, we are perfectly justified in holding that this particular practice which has prevailed up to 1885

among bankers was the right one, and that the new practice is not warranted by the terms of the statute.

I think therefore the appeal ought to be allowed.

BOWEN, L.J. I am of the same opinion. I desire to point out emphatically the limits beyond which our judgment does not go. We are dealing in this case with short loans only, that is to say, with loans made for a period short of one year, loans which are not intended to be continued, and are not continued, for a long period. The question is whether the interest in such a case, where the interest has to be paid at the expiration of the short period, is yearly interest of money within s. 40. It seems to me it is not yearly interest at all; it is not calculated with reference to a year in any sense, although it is true that it is expressed in a notation which is borrowed from the language of cases where there are yearly loans, or where the interest is calculated by the year. It is convenient to express in that notation the amount of interest that has to be paid, but it is not calculated on a year, nor on the supposition that the loans would last for a year, therefore it is not yearly interest. When it runs over, then the interest becomes payable during the times it runs over it, and is calculable with reference to the time it is outstanding, and the case may there be different. If this view is right we are not overruling what was said in *Bebb* v. *Bunny*. (1) The Vice-Chancellor there expressly confines his judgment to interest at a yearly rate which may have to be paid de anno in annum, such as interest on purchase-money or mortgage interest, and the only ground on which I differ respectfully from the Court below is that they seem to think that *Bebb* v. *Bunny* (1) necessarily governs this case. I do not think it does so, but that it applies to other cases of a different kind. I think therefore the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Woodroofe & Burgess.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) 1 K. & J. 216.

A. M.

1889
June 24.

LOWDEN *v.* BLAKEY.

Practice—Production of Documents—Privileged Communications—Order XXXI., *rr.* 15–18.

A successful plaintiff in a Chancery action, brought to restrain the infringement of his trade-mark, drafted an advertisement of the proceedings in and result of the action for publication in a trade journal; before publication the draft was submitted to counsel, and the advertisement as settled by him was published. One of the defendants in the Chancery action, alleging the advertisement to be libellous, brought an action for libel in respect of its publication, and sought to obtain inspection of the draft advertisement:—

Held, that the document was privileged from production within the rule as to professional privilege adopted in *Minet* v. *Morgan* (Law Rep. 8 Ch. 361).

Wheeler v. *Le Marchant* (17 Ch. D. 675) commented on

APPEAL from the order of a master ordering the plaintiff to produce for inspection a document referred to in an affidavit, referred by Wills, J., at chambers to the Court.

It appeared that in 1886 Blakey, the present defendant, had brought an action in the Chancery Division against Lowden, the present plaintiff, and others, to restrain an alleged infringement by them of his rights in his trade-mark in certain boot protectors of which he was the patentee, and in 1888 a perpetual injunction was granted by Chitty, J., whose decision was subsequently affirmed on appeal. Further proceedings having taken place arising out of an alleged breach of the injunction, the present defendant caused an advertisement of the proceedings in the Chancery action and of the decision therein to be inserted in the "*Boot and Shoe Trades' Journal*," upon which Lowden brought the present action for libel, and took out a summons for an injunction against the continuation of the publication of the advertisement. On this summons an affidavit was made by the present defendant, in which he said that he had himself prepared a draft advertisement which had been settled by the counsel who appeared for him in the Chancery action, the form in which it was so settled being that in which it was published in the newspaper. An order having been made under Order XXXI., rr. 15–18, by a master for the production of the draft advertisement, an appeal from his decision was referred by Wills, J., to the Court.

Rosenthal, for the plaintiff. The draft affidavit is privileged as being a communication made to a professional adviser in his professional capacity. It is true that it was not sent to counsel during the pendency of an action, nor was it strictly made with a view to expected litigation, but it was a proceeding in reference to the Chancery action, and falls within the definition of professional privilege adopted by Lord Selborne and Mellish, L.J., in *Minet* v. *Morgan*. (1)

[He also cited *Pearse* v. *Pearse* (2); *Manser* v. *Dix*. (3)]

Cracroft, for the plaintiff. The document is not privileged. It is not within the rule laid down by Jessel, M.R., in *Wheeler* v. *Le Marchant* (4), that the protection of confidential communications is restricted to the obtaining the assistance of lawyers as regards the conduct of litigation or the rights to property.

DENMAN, J. In this particular case I am of opinion that this order ought not to have been made. The history of the case is unusual. The defendant had been one of several persons who brought an action for infringement of their rights in certain trade-marks and succeeded in the action, and obtained an injunction against the continuance of the infringement complained of. Amongst others of whose conduct he complained in that action was the present plaintiff. After the conclusion of that action the present defendant consulted his counsel as to the extent of his success, and with a view to warn persons who might do anything to infringe his ascertained rights. I assume for the present purpose that he had it in his mind that the publication of any advertisement might possibly be dangerous, as being likely to induce his late opponent to sue him for libel if it contained anything incorrect; this is sometimes a very nice matter, and so I assume that the defendant contemplated that the least departure from accuracy would expose him to an action for libel. I assume also that he had a valid and honest complaint against the present plaintiff. The defendant then drafted an advertisement and sent it to the counsel who had been concerned for him in the former proceedings, in order that he might see that the statements in the advertisement were accurate. No doubt he also thought

(1) Law Rep. 8 Ch. 361.
(2) 1 De G. & Sm. 12.
(3) 1 K. & J. 451.
(4) 17 Ch. D. 675.

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LOWDEN v. BLAKEY.

Denman, J.

that the advertisement might prevent some sales by the plaintiff of goods with this particular trade-mark. This state of things might bring the case within the narrowest definition of privilege as laid down in *Wheeler* v. *Le Marchant* (1) by Jessel, M.R., who says that the privilege accorded to confidential communications is restricted to the obtaining the assistance of lawyers as regards the conduct of litigation or the rights to property; I am not sure that it is not privileged as being a communication with regard to the protection of rights to property within that definition. But I do not think that that definition is wide enough or is a definition of privilege in its fullest extent.

I rest my opinion on the large and general words used by Kindersley, V.C., in *Lawrence* v. *Campbell* (2), and which were acted on by Lord Selborne and Mellish, L.J., in *Minet* v. *Morgan.* (3) I have been in the habit of acting upon this definition at chambers, and I am clearly of opinion that the decision in *Minet* v. *Morgan* (3) really covers this case.

If it is necessary to say that this was a communication made in anticipation of future litigation, there is much to be said in favour of that view.

As to the rules, the plaintiff bases his right to production on Order XXXI., rr. 15–18. There was nothing here to prevent the plaintiff from giving the notice under r. 15, and in fact he did give it. What is the effect of such a notice? That the documents, if not produced, cannot be given in evidence at the trial. That does not apply to the present case, for there is no reason to suppose that the defendant could use this draft as substantive evidence; it is not in the least material to his case. The fact of course is that the plaintiff is trying to establish malice by pointing out the difference between the defendant's draft and the advertisement which obtained the sanction of counsel. Our decision makes no alteration in the law; we think this was a confidential communication to counsel for the purpose of obtaining his advice, and that it was privileged, although it did not relate to existing litigation, which is the effect of the decision in *Minet* v. *Morgan.* (3)

(1) 17 Ch. D. 675. (2) 4 Drew. 485, 490.
(3) Law Rep. 8 Ch. 361, 368.

CHARLES, J. I entirely agree, and have nothing to add, except that I fail to see why *Minet* v. *Morgan* (1) does not govern this case.

Appeal allowed.

Solicitor for plaintiff: *A. V. Green.*

Solicitor for defendant: *Ernest Salaman.*

W. J. B.

[IN THE COURT OF APPEAL.]

July 6.

WALKER *v.* WILSHER.

Practice—Costs—Jurisdiction of Judge to deprive Plaintiff of Costs—"Good Cause"—Order LXV. *r.* 1.

Letters or conversations written or declared to be "without prejudice" cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs.

APPEAL from an order of Huddleston, B., depriving the plaintiff of costs.

The action was tried with a jury, and resulted in a judgment by consent for the plaintiff for an agreed sum. Application was then made to the learned judge to order that the plaintiff should be deprived of costs. In support of this application, letters, containing proposals for the settlement of the action, which passed between the solicitors, were produced and handed to the learned judge with a view to shew that the plaintiff at an early stage of the litigation could have settled the action for the amount finally accepted, and the defendant's solicitor was called and examined and gave evidence to the same effect. The letters were expressed to be without prejudice, and it was admitted that the suggestions for compromise spoken to by the witness were also made without prejudice. The reception of the letters and evidence was objected to, but the learned judge considered they established misconduct for which the plaintiff ought to be deprived of costs, and he made an order accordingly.

The plaintiff appealed.

July 4. *McCall,* in support of the appeal. Communications between litigants made without prejudice are excluded as evi-

(1) Law Rep. 8 Ch. 361, 368.

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dence on the ground of public policy: *Hoghton* v. *Hoghton* (1); *Jones* v. *Foxall* (2); and the reason for exclusion applies to a question of costs as much as to issues. In determining whether there is good cause to deprive the plaintiff of costs, the judge must be guided by the facts proved at the trial, and if he was not entitled to look at this evidence there was no evidence of misconduct before him. *Williams* v. *Thomas* (3) is the only authority for the admission of such evidence, and it is submitted that the view taken by the Vice-Chancellor in that case was incorrect.

Crump, Q.C., and *Lewis Thomas*, contrà. "Without prejudice," means that the matter is not to affect the issues. Here the issues were disposed of, and the only question that remained was the incidence of the costs. To determine whether there was good cause to deprive either party of costs, the judge must look at the conduct of the parties, and is entitled to look at letters written without prejudice to see whether there has been misconduct of any kind. If there has been such misconduct there is good cause on which the judge may exercise his discretion.

McCall, in reply.

Cur. adv. vult.

July 6. LORD ESHER, M.R. In this case, which was tried before Huddleston, B., with a jury, a verdict was given by consent for the plaintiff for 100*l.* On the question of costs the learned judge decided that there was good cause for depriving the plaintiff of costs, and he accordingly made an order to that effect. If there was good cause within the meaning of Order LXV. r. 1, the discretion of the judge to deal with the costs as he thought fit is absolute, and cannot be reviewed, but the recent case of *Huxley* v. *West London Extension Railway Co.* (4), in the House of Lords, has settled that the question whether there is good cause or not is subject matter of appeal. In this case, the cause on which the learned Baron acted was contained in some letters which he read, and also in the evidence of an interview between the parties relating to a compromise. The letters and the interview were without prejudice, and the question is whether under such

(1) 15 Beav. 278.
(2) 15 Beav. 388.
(3) 2 Dr. & Sm. 29.
(4) 14 App. Cas. 27.

circumstances they could be considered in order to determine whether there was good cause or not for depriving the plaintiff of costs. It is, I think, a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed. I am, therefore, of opinion that the learned judge should not have taken these matters into consideration in determining whether there was good cause, and, as that was all that was before him on the point, if that is excluded, it follows that there was no good cause, and that the plaintiff should not have been deprived of his costs. It is very rare for us to differ from so accurate and careful a judge as Huddleston, B., but in this case I think he had no materials on which he could properly act, and that therefore his decision must be set aside.

LINDLEY, L.J. This appeal raises a question of great importance both as to cases tried with juries and those tried by a judge without a jury. We have to decide whether a judge is entitled to look at letters written without prejudice, in order to determine a question of the existence of good cause for depriving a successful litigant of costs. The authorities do not appear to be uniform on the point. On the one hand there are cases which indicate that the letters should not be looked at, but on the other there is a case before Kindersley, V.C., in which, under very similar circumstances, letters written without prejudice were looked at and acted on by the Vice-Chancellor upon the question of costs. It becomes, therefore, necessary to consider the point with care. What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given. Supposing that a letter is written without prejudice then, according both to authority and to good sense, the answer also must be treated as made without prejudice. That was laid down in the case of

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Lindley, L.J.

Paddock v. *Forrester*. (1) In my opinion, in the case of *Williams* v. *Thomas* (2), to which I have referred, Kindersley, V.C., failed to attribute sufficient weight to that case. When the question of costs was raised a letter written without prejudice was referred to. Objection was taken to this, and the Vice-Chancellor said that he considered that the term "without prejudice" contained in the letter meant that the writer of it must not be prejudiced by it, but that he did not think it followed that it was not competent to the writer to use it, although it could not be used against him. I cannot help thinking that the Vice-Chancellor overlooked the fact that the object of putting in the letter was to prejudice the opposite party by putting in the answer to it. That case is the only authority that I know of for the course taken by the learned judge, and, when we come to consider the principle on which it was decided, it does not convince me that a judge is entitled to look at letters written without prejudice unless he has the consent of both parties to his so doing. No doubt there are cases where letters written without prejudice may be taken into consideration, as was done the other day in a case in which a question of laches was raised. The fact that such letters have been written and the dates at which they were written may be regarded, and in so doing the rule to which I have adverted would not be infringed. The facts may, I think, be given in evidence, but the offer made and the mode in which that offer was dealt with—the material matters, that is to say, of the letters—must not be looked at without consent. I think, therefore, that there was no good cause for depriving the plaintiff of costs, and that the decision should be reversed.

BOWEN, L.J. Whether there was good cause or not for depriving the plaintiff of his costs depends entirely on the question whether the learned judge was entitled to look at letters which were written without prejudice and to listen to a witness who detailed an offer, which had also been made without prejudice, to compromise the action. Negotiations which have taken place without prejudice may be material under circumstances which are not present here. The fact of those negotiations may perhaps

(1) 3 Sc. N. R. 715, 734. (2) 2 Dr. & Sm. 29.

in such circumstances be given in evidence, but the question whether what was said or done at such negotiations is admissible is a very different one. The precise question now before us, as to the admissibility of such evidence for the purpose of deciding as to the costs of an action could not have arisen before the Common Law Procedure Act, 1852. Up to then costs at common law always followed the event, and it naturally follows that there is no authority before that time on the point. Then comes the case before Kindersley, V.C., who did precisely what Huddleston, B., has done here. I think there was a confusion of thought and reasoning in the judgment of the Vice-Chancellor which we ought not to hesitate to point out. The use that the defendant sought in that case to make of the offer which had been made without prejudice was to attract the attention of the Court to the conduct of the plaintiff upon receiving it. In my opinion it would be a bad thing and lead to serious consequences if the Courts allowed the action of litigants, on letters written to them without prejudice, to be given in evidence against them or to be used as material for depriving them of costs. It is most important that the door should not be shut against compromises, as would certainly be the case if letters written without prejudice and suggesting methods of compromise were liable to be read when a question of costs arose. The agreement that the letter is without prejudice ought, I think, to be carried out in its full integrity. I agree, therefore, in thinking that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *H. A. Lovett & Co.*
Solicitors for defendant: *Aird & Hood.*

A. M.

1889
July 22

DUBOUT & Co. *v.* MACPHERSON.

Practice—Third Party Notice—Service out of the Jurisdiction—Rules of Supreme Court, 1883, *Order* XI., *r.* 1 (*c*); *Order* XVI., *r.* 48.

Where, in an action for a breach within the jurisdiction of a contract which according to the terms thereof ought to be performed within the jurisdiction, the defendant claims to be entitled to an indemnity from a third party, the Court may allow service out of the jurisdiction of a notice of such claim, unless the third party is domiciled or ordinarily resident in Scotland or Ireland.

APPLICATION for leave to serve a third party notice out of the jurisdiction.

This was an action brought by the plaintiff as indorsee of two bills of exchange accepted by the defendant payable in London. The defendant claimed to be entitled against one Boisduval to an indemnity against a portion of his liability, on the ground that Boisduval had, at the time of his accepting the bills, and in consideration of his so accepting them, contracted to pay him 50 per cent. of the proceeds of the acceptances when negotiated, and had never paid him. Before applying for leave to issue a third party notice, the defendant applied to Wills, J., at chambers, for leave to serve such notice, if and when issued, upon Boisduval in France, where he resided. Wills, J., doubting whether he had power to give leave to serve such a notice out of the jurisdiction, referred the question to the Court.

J. E. Raven, for the defendant, in support of the application. *Swansea Shipping Co.* v. *Duncan* (1) is in point. It was there held under the rules of 1875 that a third party notice might be served out of the jurisdiction under any circumstances under which a writ of summons might be served out of the jurisdiction. That decision is equally applicable to the rules of 1883. In the notes to Order XI., r. 1, in Wilson's Judicature Act, 7th ed., and in the Annual Practice for 1888–9, doubts are indeed expressed as to whether service out of the jurisdiction of a third party notice would be allowed under the present rules; but the cases of *Speller* v. *Bristol Steam Navigation Co.* (2), and

(1) 1 Q. B. D. 644. (2) 13 Q. B. D. 96.

In re Busfield (1), upon which those doubts are founded, do not support them.

A. L. SMITH, J. In this case my brother Wills doubted whether he had power under the rules to allow service of a third party notice out of the jurisdiction. Primâ facie these rules are applicable only to persons within the jurisdiction, and the question is whether there is anything in the rules relating to third party notices which specially permits of service upon persons out of the jurisdiction. This question arose in the case of *Swansea Shipping Co.* v. *Duncan* (2), under the rules of 1875; and the Court of Appeal there held that the provision in Order XVI., r. 18, of those rules, to the effect that such a notice should be served "according to the rules relating to the service of writs of summons," empowered the Court to allow service of such a notice out of the jurisdiction. That provision as to the service of third party notices is reproduced in terms in Order XVI., r. 48 of the rules of 1883. The third party in *Swansea Shipping Co.* v. *Duncan* (2) was a company carrying on business in Scotland, but there was no exception in the rules of 1875 to the service of writs out of the jurisdiction in favour of persons ordinarily resident in Scotland, corresponding to that which is to be found in the rules of 1883.

A similar point arose after the rules of 1883 came into force, in the case of *Speller* v. *Bristol Steam Navigation Co.* (3), where leave was sought to serve a third party notice out of the jurisdiction on a person ordinarily resident in Scotland, on the suggested ground that he was a "proper party" to the action within the meaning of Order XI., r. 1 (*g*). The Court there held that they had no power to give such leave, and that sub-s. (*g*) of that rule did not apply to third party notices. That decision is not in any way in conflict with the decision in *Swansea Shipping Co.* v. *Duncan* (2), and is no authority against the present application. Nor is the case of *In re Busfield* (1) any authority against it. It was there decided that the Court cannot order service of an originating summons out of the jurisdiction; and with that decision I quite agree, because there is no rule applicable to

(1) 32 Ch. D. 123. (2) 1 Q. B. D. 644. (3) 13 Q. B. D. 96.

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the service of an originating summons corresponding to the provision as to the service of third party notices in Order XVI. r. 48.

The principle, then, of the *Swansea Case* (1) still applies; and the effect of the decision in that case, when read along with Order XI., r. 1 (*e*), amounts to this, that wherever the action is founded on a breach within the jurisdiction of a contract which according to the terms thereof ought to be performed within the jurisdiction, the Court may allow service of a third party notice out of the jurisdiction, unless the third party is domiciled or ordinarily resident in Scotland or Ireland. The application must be granted, but the case must go back to Wills, J., to ascertain whether there was in fact a contract of indemnity, and whether consequently a third party notice should issue at all.

DAY, J., concurred.

Application granted.

Solicitor for defendant: *C. J. Cole.*

J. F. C.

July 30.

[IN THE COURT OF APPEAL.]

CANADA SHIPPING COMPANY *v.* BRITISH SHIPOWNERS' MUTUAL PROTECTION ASSOCIATION.

Insurance (Marine)—Mutual Insurance Company—"Improper Navigation."

By the rules of the defendants, a shipowners' mutual insurance association, the plaintiffs were entitled to protection in respect of "damage to goods on board when caused by the improper navigation" of their ship, but were not entitled to claim in respect of "damage caused by improper stowage."

A cargo of wheat while in the hold of the plaintiffs' ship was damaged, owing to a taint communicated to the wheat through the ceiling and limber boards of the vessel having been saturated with a composition which had leaked from the previous cargo. The ceiling and limber boards had not been properly cleaned before the wheat was stowed:—

Held (affirming the judgment of Charles, J.), that the damage was not caused by "improper navigation."

Quære, whether it was caused by "improper stowage."

Carmichael v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (19 Q. B. D. 242) distinguished.

APPEAL from the judgment of Charles, J., for the defendants.

The facts are fully stated in the report of the case in the Court

(1) 1 Q. B. D. 644.

below (1), and appear sufficiently for the purposes of this report from the head-note.

Barnes, Q.C., and *Carver*, for the plaintiffs. The case of *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (2) shews that for this purpose the meaning of the term "navigation" is not confined to such matters relating to the sailing of the ship as would ordinarily be included in the term; but it must receive a more extensive signification. "Navigation" as applied for this purpose to a ship carrying cargo includes everything necessary for the safe carriage of the cargo to its destination. If the ship is unfit to carry the cargo, it is improper navigation in this sense to ship the cargo in a ship in such a state. This was not a case of "improper stowage." That means arrangement of the cargo in an improper manner, not placing it in a ship unfit to receive it. [They cited *Good* v. *London Steamship Owners' Association.* (3)]

Cohen, Q.C., and *Joseph Walton*, for the defendants, were not called upon.

LORD ESHER, M.R. I do not think that in the case of *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (2) the Court held that what happened there was not improper navigation in the ordinary sense of the term, but gave the word "navigation" a meaning other than its ordinary meaning. If they had done so, I think it would have been a very wrong decision. It appears to me that the paraphrase there given of the word "navigation" accurately expressed the ordinary meaning of the word. It was there said that, if there was negligence on the part of the shipowner or his servants before the navigation of the ship commenced, which had the effect of causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, that would make the navigation "improper navigation." The ship was there sent to sea in such a condition that she could not be safely navigated with regard to the safety of the cargo, and therefore she was in fact improperly navigated. If the meaning so given to the term "improper

(1) 22 Q. B. D. 727. (2) 19 Q. B. D. 242.
(3) Law Rep. 6 C. P. 563.

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Lord Esher, M R.

navigation" be correct, then can it be said that the loss here was occasioned by improper navigation? In my opinion it cannot. The ship in this case was in a perfectly proper condition so far as regarded her capacity for being sailed with safety to the goods on board. The damage happened from something inside the ship, having nothing whatever to do with her sailing qualities, viz., the hold's happening to be in a dirty condition. I think that the learned judge was perfectly right in his construction of the words "improper navigation," and his application of those words to the facts of the case; and I entirely agree with his reasoning on that point. I do not think it is necessary to decide whether what happened amounted to improper stowage. The appeal must be dismissed.

LINDLEY, L.J. It seems to me impossible to say that, because the ship smelt of creosote, she was improperly navigated. The ship was undoubtedly unfit to receive that particular cargo but that unfitness had nothing whatever to do with the navigation of the ship. It was argued that the case came within the decision in *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (1), but the facts there were wholly different.

BOWEN, L.J. I am of the same opinion. The question is whether the damage in this case was caused by "improper navigation," and depends on the meaning of that expression. I should have thought it clear that "damage caused by improper navigation" was equivalent to damage caused by navigation of an improper kind, and consequently that damage, caused by something which was not navigation at all, was not caused by improper navigation. Navigation must mean something having to do with the sailing of the ship; that is, of course, the sailing of the ship having regard to the fact that she is a cargo-carrying ship. Here the damage was caused by something which had nothing to do with the sailing of the ship. But it is said that *Carmichael's Case* (1) decided that damage caused by something which had nothing to do with navigation in the ordinary sense ought to be considered to have been caused by improper navi-

(1) 19 Q. B. D. 242.

gation. I do not think that the case decided anything of the kind. It seems to me that the paraphrase given in that case by the Master of the Rolls of the term "improper navigation" was absolutely accurate. The mode in which that case has been used in argument illustrates the danger which arises from the citation of expressions without reference to the subject-matter in relation to which they were used. Certain expressions which were used in that case by the other members of the Court seem to me capable of misconstruction if read without reference to the particular subject matter to which they related: and it seems to me that the counsel for the plaintiffs misapplied the language so used by applying it to a wholly different state of facts. The case really decides that the navigation was none the less improper navigation because it was the consequence of something which was done before the voyage commenced.

Appeal dismissed.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co.*

Solicitors for defendants: *W. A. Crump & Sons.*

E. L.

TATAM *v.* HASLAR AND ANOTHER.

June 21.

Bill of Exchange—Fraud in Negotiation—Value "in good faith given"—Onus of Proof—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 30, *sub-s.* 2.

By s. 30, sub-s. 2, of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), it is enacted that "every holder of a bill is deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill:"—

Held, that when fraud is proved the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith without notice of the fraud.

MOTION for a new trial.

The plaintiff sued upon a bill of exchange for 500*l.*, drawn by the defendant Johnstone, and accepted by the defendant Haslar, payable to the order of Johnstone, and indorsed by him to the

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plaintiff. Judgment had been signed against Johnstone, but Haslar, having obtained leave to defend, pleaded that he had accepted the bill and handed it to one Leslie for the purpose of getting it discounted for him; that there was no consideration for his acceptance, and that Leslie fraudulently handed over the bill to Johnstone, who fraudulently indorsed it to the plaintiff, who took it without consideration and with notice of the fraud.

At the trial, before Field, J., and a jury, the plaintiff gave evidence of the fraudulent negotiation of the bill, which the judge held to be sufficient to throw upon the plaintiff the onus of proving that he gave value in good faith. The plaintiff gave evidence, and proved that he had given 450*l.* for the bill, and also alleged that he had bought the bill honestly, without notice of the fraud.

The learned judge, in his summing-up, told the jury that the onus was on the plaintiff to satisfy them that he really gave value for the bill, but on the defendant to satisfy them that the plaintiff took the bill under such circumstances as to invalidate his title, because he had, or ought to have had, notice of the fraud. The learned judge also told the jury that the plaintiff was a bonâ fide holder for value, if he really and truly advanced the value alleged by him.

The jury found a verdict for the defendant, and the plaintiff moved that judgment might be entered for him, or a new trial had, on the ground that the judge misdirected the jury in telling them that there was evidence of circumstances which should have put the plaintiff upon inquiry, and that the verdict was against the weight of evidence.

Greene, Q.C., and *A. T. Lawrence*, for the plaintiff. There was no evidence of any fraudulent dealing with the bill. The plaintiff admittedly gave value for the bill, and there was no evidence that he had, or ought to have had, notice of any fraudulent dealing: *Jones* v. *Gordon* (1).

Whately (*Cock, Q.C.*, with him), for the defendant. The onus was upon the plaintiff of satisfying the jury that he gave value, and that he gave it in good faith. "In good faith" means

(1) 2 App. Cas. 616.

without notice of any fraud: *Raphael* v. *Bank of England.* (1) Before the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), it was uncertain whether, in a case where the defendant had proved fraud, the onus was thrown on the plaintiff of proving absence of notice as well as value given: *Jones* v. *Gordon* (2). This has been settled by the Act. Sect. 30, sub-s. 2, provides that it must be shewn that value has in good faith been given, and s. 29, sub-s. 1 (*b*), shews that that must mean that the holder must prove both value and good faith; s. 90 defines "good faith" to be the doing of a thing honestly. The jury were entitled to find a verdict for the defendant on the ground that the plaintiff had not satisfied them that value had been given honestly without notice of the fraud.

Greene, Q.C., in reply.

DENMAN, J. The summing-up of the learned judge has been read through and fully commented upon, and I have come to the conclusion that, upon the true construction of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), he put the case too favourably for the plaintiff. Inasmuch as the argument in this case has turned to a great extent upon what is the present state of the law under the Act, I think that we must express our opinion upon it. The first clause with which we must deal is s. 30, sub-s. 2, which provides that "Every holder of a bill is primâ facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud . . . . the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." Now the learned judge told the jury that, if money had really and in fact been given for the bill, value had in good faith been given. I have never so read this section of the Act; and I think that the attention of the learned judge could not have been called to the other clauses of the Act. Giving "value in good faith" must mean something more than the mere actual and real passing of money or other value, and this appears clearly when the other clauses of the Act are looked at. A "holder in due course" is,

(1) 17 C. B. 161. (2) 2 App. Cas. 616, 628.

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by s. 29, sub-s. 1 (*b*), defined to be a person who has taken a bill in good faith and for value and without notice of any defect in the title of the person who negotiated it. Then s. 30, sub-s. 2, says, in effect, that, if fraud in the inception or negotiation of a bill is proved or admitted, the holder must prove that he is a holder in due course as defined by s. 29, sub-s. 1 (*b*). Again, s. 90 says that "a thing is deemed to be done in good faith . . . when it is in fact done honestly, whether it is done negligently or not." This clause is obviously founded upon the distinction, which is pointed out by Lord Blackburn in *Jones* v. *Gordon* (1), between honest blundering or carelessness and a dishonest refraining from inquiry. Applying that construction to the words "value given in good faith" at the end of s. 30, sub-s. 2, it appears to me that those words mean value given honestly and without any notice of the fraud, in the sense explained by Lord Blackburn, and not merely the actual giving of value.

The words of s. 30, sub-s. 2, "if it is admitted or proved," mean no more than that some evidence of circumstances in the nature of fraud must be given sufficient to be left to the jury. That was the old law, as stated in *Hall* v. *Featherstone* (2), which has not, I think, been altered by this Act. When, therefore, some sufficient evidence of fraud has been given, as in this case, the onus is on the plaintiff to prove both that he gave value and that he had no notice of the fraud in the sense explained by Lord Blackburn in *Jones* v. *Gordon*. (1)

In this case there was evidence of fraud which could not have been withdrawn from the jury, and their verdict on that point cannot be set aside as against the weight of evidence. The onus of proving that he had no notice being upon the plaintiff, it was essentially a matter for the jury to say whether he had satisfied them on that point, and I think that even had the onus been upon the defendant there was evidence upon which the jury were entitled to find a verdict for him. The verdict, therefore, cannot be disturbed.

CHARLES, J. It is impossible to say that there was not abundant evidence of the fraud, practised upon the plaintiff, to sup-

(1) 2 App. Cas. 616, at p. 629. (2) 3 H. & N. 284.

port the verdict. Then arises the important question in the case whether there were circumstances in the transaction which ought to have led the plaintiff to make inquiries, and he wilfully abstained from inquiry.

At the time of the passing of the Bills of Exchange Act, 1882, it was uncertain how much the plaintiff had to prove in cases of this kind when evidence of fraud had been given. Lord Blackburn, in *Jones* v. *Gordon* (1), says, "the language of the quotation from Mr. Baron Parke would seem to shew that the onus as to both is shifted, but I do not think that has ever been decided, nor do I think it is necessary to decide it in the present case." The learned judge who tried this case took the view that the onus was shifted only to the extent of making the plaintiff prove that value was in fact given, not that it was also given bonâ fide. Upon the construction of the Act, I respectfully differ from him. The plaintiff was bound to satisfy the jury that he gave value, and that he gave it in good faith. The Act has settled the law in accordance with the opinion expressed by Parke, B.

I agree with my brother Denman as to the meaning of the words "admitted or proved" in the earlier part of s. 30, sub-s. 2. The latter part of that section says that the holder must prove that value was in good faith given for the bill. Referring back to s. 29, sub-s. 1 (*b*), a holder in due course is defined to be a person who has taken a bill in good faith and for value and without notice of any defect in the title of the person who negotiated it. Therefore a holder is by s. 30, sub-s. 2, deemed to be a holder in due course until fraud is proved, but in that case he must prove that he is a holder in due course as defined in s. 29, sub-s. 1 (*b*). "Good faith" is by s. 90 defined to be the doing of a thing honestly. When, therefore, fraud has been proved the holder must prove that he gave value honestly without notice of the fraud. The jury have found against the plaintiff, and the verdict must stand.

Motion dismissed.

Solicitors for plaintiff: *Thorneycroft & Willis.*
Solicitors for defendant: *Roopers & Whately.*

H. D. W.

(1) 2 App. Cas. 616, at p. 628.

1889
June 7.

[IN THE COURT OF APPEAL.]

SPINCER *v.* WATTS.

Practice—Discontinuance of Action—Notice—Costs—"Proceeding taken in action after receipt of defence"—Claim and Counter-claim—Payment of Money into Court by Defendant, and acceptance by Plaintiff in satisfaction—Payment of Money into Court by Plaintiff in satisfaction of Counter-claim—Rules of Supreme Court, 1883, *Order* XXVI., *r.* 1.

By Order XXVI., r. 1, the plaintiff may at any time after the receipt of the defendant's defence, "before taking any other proceeding in the action (save any interlocutory application) by notice in writing wholly discontinue his action against all or any of the defendants."

In an action by the holder against the acceptor and the drawer of a bill of exchange, the acceptor paid money into court in satisfaction of the claim, while the drawer delivered a defence denying liability, and set up a counter-claim. The plaintiff, after receipt of the defence, paid into court the amount of the counter-claim, and took out of court the amount paid in by the acceptor, and then gave the drawer notice of discontinuance:—

Held, that the plaintiff had not "taken any proceeding in the action after receipt of the defence" such as to prevent him from giving notice of discontinuance.

APPEAL against the refusal of a Divisional Court (Pollock, B., and Manisty, J.) [affirming the decision of Mathew, J., in chambers], to direct the registrar of the Southampton district to tax the costs of the defendant Watts.

The action was brought upon a bill of exchange for 21*l.* 15*s.*, of which the plaintiff was the indorsee. The defendant Watts was the drawer; the other defendants, Charles Welch and M. E. Welch, were the acceptors. On December 1 the acceptors paid into court 23*l.* 9*s.* 2*d.*, in satisfaction of the plaintiff's claim. On December 5 the plaintiff's solicitors gave notice in writing to the acceptors that the plaintiff accepted the sum of 23*l.* 9*s.* 2*d.*, paid by the acceptors into court, "in satisfaction of the claim in respect of which it is paid in." On the same day the defendant Watts delivered a defence and counter-claim. By his defence he denied that he was indebted to the plaintiff in the amount claimed, and he set up a counter-claim for 26*l.* 9*s.* 6*d.* After the receipt of the defence the plaintiff took the money paid in by the defendants Welch out of court, and on December 10 the

plaintiff paid 26*l.* 9*s.* 6*d.* into court in satisfaction of the counter-claim, and gave notice in writing of the payment to the defendant Watts. On December 12 the plaintiff's solicitors wrote to the defendant Watts informing him that they did not propose to prosecute the action any further against him as far as the plaintiff's claim was concerned. (1)

C. C. Scott, for the defendant Watts. The plaintiff is liable to pay the defendant's costs of the action. Notice of discontinuance having been given, the defendant is, by rule 1 of Order XXVI., absolutely entitled to the costs of the action. By rule 1, upon the notice being given, the plaintiff "shall pay" the defendant's costs of the action.

Gye, for the plaintiff. Assuming that the letter of December 12 was in form a good notice of discontinuance, it was too late to give such a notice. After the plaintiff had accepted the amount paid into Court in satisfaction of his claim, his cause of action was gone, and there was nothing to discontinue. And, by the terms of rule 1 of Order XXVI. itself, the plaintiff was not then entitled to give a notice of discontinuance, because, after receipt of the defence of the defendant Watts, he had taken some other proceedings in the action. He had taken out the money paid in by the defendants Welch, and he had paid in money to satisfy the counter-claim of the defendant Watts. He could not, therefore, discontinue the action without the leave of the Court or a judge, and that leave was not asked for.

C. C. Scott, in reply. Taking money out of Court is not a "proceeding" within the meaning of rule 1. And the payment into Court by the plaintiff was not a proceeding "in the action;" it was a proceeding in the counter-claim, which is a distinct matter. The word "action" in rule 1 of Order XXVI. cannot include a counter-claim; if it did, then, however unfounded the counter-claim might be, the plaintiff would have to pay the costs of it.

(1) Questions besides those referred to in this report were raised on the appeal, amongst others, whether this letter was in form a sufficient notice of discontinuance, and whether the counter-claim was a valid one, but it is not considered necessary to report the argument and decision upon those points.

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SPINCER v. WATTS.

LINDLEY, L.J. The question is, whether the defendant Watts is entitled to the costs of the action. The action was brought upon a bill of exchange against the defendants Welch, who were the acceptors, and the defendant Watts, who was the drawer, of the bill, the plaintiff being the holder for value. On December 1 the acceptors paid the amount claimed by the plaintiff into court. That put an end to the action upon the bill, and, if nothing more had taken place, the plaintiff would have been entitled to sign judgment for the costs of the action against all three defendants. The defendant Watts, who is a solicitor, in order to protect himself against the costs of the action, put in on the same day a defence and a counter-claim. By his defence he claimed to set off against the plaintiff's demand an amount which he alleged to be due to him by the plaintiff for costs. And he counter-claimed for the amount of those costs. The plaintiff then paid the amount thus claimed for costs into Court. On December 12 the plaintiff's solicitors wrote the letter which was relied upon as a notice of discontinuance of the action. One of the questions which arises is, whether that letter was a good notice of discontinuance, and another question is, whether the plaintiff had at that time any right to discontinue the action without the leave of the Court. I think that the letter may be regarded as a sufficient notice of discontinuance.

The next question is, whether the notice was given in time. Rule 1 of Order XXVI. provides that "the plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants . . . . and thereupon he shall pay such defendant's costs of the action. . . . Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge." The notice of discontinuance here was given after the money had been paid into court by the defendants Welch, and had been taken out by the plaintiff, and after the plaintiff had paid into court the amount claimed by the defendant Watts. It is said that it was then too late for the plaintiff to give a notice of

discontinuance, because he had, after receipt of the defence, taken a "proceeding" in the action, not being an interlocutory application. I think that the exception throws some light upon the meaning of the words "before taking any other proceeding in the action," and, having regard to it and to the object of the rule, I think what is meant is, "taking any proceeding with the view of continuing the litigation with the person against whom the proceeding is taken." In the present case no proceeding was taken by the plaintiff with that view after the delivery of the defence. I think, therefore, that the plaintiff's technical objection fails, and it follows that he must pay the defendant Watts' costs of the action up to the date of the notice of discontinuance.

LOPES, L.J. The first question is, whether the letter of December 12 was a good notice of discontinuance. I think that it amounted to such a notice in writing as was contemplated by the rule.

But it is said that, after the receipt of the defence, the plaintiff had taken a "proceeding in the action," which prevented him from giving a notice of discontinuance. He had taken out the money which had been paid in by the defendants Welch, and he had paid into Court the amount claimed by the defendant Watts. I do not think that either of those steps is the kind of "proceeding" which was contemplated by rule 1 of Order XXVI. I think the rule intended a proceeding which is to have the effect of continuing the action—not a proceeding which has the effect of putting an end to the action. Therefore, I think the plaintiff was entitled to give the notice of discontinuance, and he is liable to pay the defendant Watts' costs of the action up to the date of the notice.

Appeal allowed.

Solicitor for appellant: *G. J. T. Barrett, for H. C. Guy, Southampton.*

Solicitors for respondent: *F. J. & G. J. Braikenridge, for Harfield & Son, Southampton.*

W. L. C.

1889
May 11.

[CROWN CASE RESERVED.]

THE QUEEN *v.* GORDON.

Criminal Law—False Pretences—"Prepared to pay"—Valuable Security—24 & 25 Vict. c. 96, s. 90.

The prisoner was convicted on an indictment charging that by the false pretence to the prosecutors that he "was prepared to pay to them or one of them" 100*l.*, he did then unlawfully and fraudulently induce the prosecutors to "make a certain valuable security," to wit, a promissory note for 100*l.*, with intent thereby to defraud them:—

Held, first, that the indictment was good, as it must be taken by necessary inference to allege a false pretence by the prisoner of an existing fact, viz., that he was prepared to pay the prosecutors 100*l.*, and had the money ready for them on their signing the promissory note; secondly, that the indictment shewed an offence within 24 & 25 Vict. c. 96, s. 90, of fraudulently causing a person to "make a valuable security" although the promissory note in question might not be of value until it had been delivered into the hands of the prisoner.

CASE stated by Lord Coleridge, C.J.

The prisoner was tried before the Lord Chief Justice at Worcester on an indictment of which the following is an abstract:

The charges were,—first, on June 5, 1889, with intent to defraud, obtaining from Richard Summers Brown 10*s.* 6*d.* by false pretences that he was prepared to advance 100*l.* to him "at lower interest than was charged to others," and that all advances were repayable by easy instalments, to suit applicants; second count, on January 9, 1889, with like intent, obtaining from Richard Summers Brown and Richard Brown a promissory note for 100*l.* by false pretences "that he was prepared to pay them or one of them by way of loan 100*l.*;" third count, same date, with like intent, obtaining from them the said note for 100*l.* by false pretence "that a document then presented for signature was a mere receipt for moneys advanced;" fourth count, same date, with like intent, inducing them to make said promissory note for 100*l.* by false pretence "that he was prepared to pay to them or one of them 100*l.*"; fifth count, same date, with like intent, fraudulently inducing them to execute said note for 100*l.* by false pretence "that he had agreed with said Richard Summers Brown to lend and was ready to pay over 100*l.*"

The evidence was set out in the case. It was to the following effect, viz.: that the wife of the prosecutor, Richard Summers Brown, a farmer, saw, on December 27 the following advertisement in a newspaper:

"Cash immediately advanced from 5*l.* to 500*l.*, at lower interest than charged by others, to farmers, &c., on their own security, without bondmen, on note of hand alone, repayable by easy instalments to suit applicants. All communications are received in strict confidence. No genuine application refused, and honourable and straightforward transactions guaranteed. Intending borrowers are invited (before applying elsewhere) to apply to

"Mr. J. Gordon, 6, Bridge Street, Worcester.
"Town or country. Distance no object.
"Letters immediately attended to.
"Established 1851."

She read this to her husband; they were in want of money, knew Gordon before, went to his office and asked for 100*l.*, and he, after inquiring and being told what stock they had on the farm, said he should be very pleased to lend it, that there would be 10*s.* 6*d.* for expenses, that it would be necessary to inspect their stock, and that the interest would be 5*l.* per cent. She said that they would pay back the capital 20*l.* a year. He said that he did not stop the 5 per cent. interest, and would pay the whole 100*l.* down on Wednesday morning. The wife paid the 10*s.* 6*d.* The defendant's clerk went over and inspected the stock, which subsequently realized 300*l.*, and on Wednesday morning R. S. Brown and his father, Richard Brown, went to the office and saw Gordon, who caused his clerk, Hughes, to make out two documents, which the defendant produced, and asked the Browns to sign, and they signed them. One was as follows:—

"January 9, 1889.

"We (I and my son) have this day borrowed and received of Mr. Gordon the sum of 60*l.*, for which we have agreed to pay him back 100*l.* (40*l.* interest on 60*l.*) in four quarterly instalments, as set forth on the promissory note, which we read over and signed, and which we clearly understand. We further say that all the furniture, effects, stock, &c., at our farm belong to us and it is solely our own property, and that I, Richard Brown the elder,

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have also an income of 30*l.* per year, which is payable through Mr. Davies, solicitor, of Haverfordwest. We further say that we will pay Mr. Gordon the 100*l.* honourably as promised. We read the above over.

"Witness, "Richard Brown.
"T. W. Hughes. "Richard Brown, junr."

This document was all in Hughes' handwriting, except the signature and the words "we read the above over," which were in the father's handwriting.

The other document was as follows:—

"Derby, January 9, 1889.

"100*l.*

"We jointly and severally agree to pay Isaac Gordon or order at Derby the sum of one hundred pounds, for value received, by quarterly instalments as follows, namely:—

Twenty-five pounds on April 9th, next (1889);
Twenty-five pounds on July 9th, next (1889);
Twenty-five pounds on October 9th, next (1889); and
Twenty-five pounds on January 9th (1890);

And if default shall be made in any one payment of the aforesaid instalments all the instalments remaining unpaid shall at once become due and payable immediately thereafter.

"Witness, "Richard Brown,
"T. W. Hughes. "Richard Summers Brown."

They did not read either of them over, nor were they read to them, although the defendant told the father to write down the words "We read the above over;" the defendant gave the prosecutor, R. S. Brown, a ticket [stating the loan, and bonus, and instalments, and rules]; then the defendant gave him 60*l.* "We counted it," said R. S. Brown, in his evidence "and I told him it was 60*l.* only, and not 100*l.*, which my wife had bargained for. He said that was what he charged—the 40*l.* That was all I should have. He said 'I don't do business that way'." The prosecutor did not agree, but went home to his wife, she found there was 60*l.* in a bag, and went to the magistrate's clerk, and then to the defendant's office with it and offered the money back; it was refused, and she communicated with the police.

For the defence the defendant's clerk was called and said, inter alia, that he read both documents out quite loudly to the Browns. In cross-examination, he said he knew they expected 100*l.*; it was not usual to charge 40*l.* for 100*l.*

The Lord Chief Justice, after setting out the evidence in the case, stated. "I told the jury that if they were of opinion that the prisoner obtained the promissory note for 100*l.* from the two Browns, or either of them, by falsely pretending to them that he was ready to pay and would then pay to them, or one of them, 100*l.* on their signing the note, they might find him guilty. I explained to them that a false pretence must be the representation of an existing fact untrue in fact, false to the knowledge of the person making it, and that the money or other subject-matter must be obtained or procured by means of it. I had great doubts as to the validity of counts 1, 2, and 4, and I withdrew count 3 from their consideration, as I thought it bad in law, and that there was no evidence of it, in fact. I was not free from doubt as to count 5, and I directed the jury to find separately on each count. They found the prisoner guilty on counts 1, 2, 4, and 5, and not guilty on count 3.

"I have to request the opinion of the Court of Criminal Appeal whether the conviction upon all or any of the four counts on which a verdict of guilty was entered can be sustained. If it can be sustained on any of those counts the conviction is to be affirmed, if not it is to be quashed."

Lockwood, Q.C. (*Harington*, with him), for the defendant.

[THE COURT intimated that the argument might be limited to the fourth count.]

First, no false pretence of an existing fact is alleged in the fourth count. The meaning of it is only that the defendant said, "If you will give me a promissory note for 100*l.* I will lend you 100*l.*"—that is a mere promise to do something in the future, such as would be in the case of a purchaser saying to a tradesman, "If you will send goods to my house I will pay for them."

[WILLS, J. Suppose the defendant said, "I have the intention of advancing 100*l.*," and he, in fact, had no intention of the kind.]

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That would not be a sufficient false pretence. It would be impossible to prove that his intention was not that stated at the time, although it might have been changed afterwards. The defendant was undoubtedly in a position and able to advance 100*l.*, and therefore literally "was prepared to do so."

Secondly, the promissory note was of no value while in the hands of the prosecutor, and was not a "valuable security" until parted with. Therefore the defendant did not induce the prosecutor, to "make a valuable security." In *Reg.* v. *Danger* (1) the prosecutor was induced by a false statement of the prisoner to accept and deliver to him a bill signed by him as drawer addressed to the prosecutor and made payable to the prisoner's own order. The prisoner negotiated the bill, and was convicted under s. 53 of 7 & 8 Geo. 4, c. 29, for obtaining a valuable security by false pretences. But the Court held that the conviction could not be supported, as the bill whilst in the hands of the prosecutor was of no value to him nor to any one else unless to the prisoner, and as the prosecutor had no property in the bill as a security, or even in the paper on which it was written. Lord Campbell, C.J., said the "chattel, money, or valuable security," must, to be within 7 & 8 Geo. 4, c. 29, s. 53, be the property of some one other than the prisoner. The present indictment is, however, under 24 & 25 Vict. c. 96, s. 90, and the editors of Archbold's Pleading and Evidence in Criminal Cases (20th ed.), p. 556, suggest that the statute of which this section is an amendment (20 & 21 Vict. c. 47) was no doubt introduced in consequence of the decision in *Reg.* v. *Danger*. (1)

Amphlett, for the prosecution, was not called upon to argue.

LORD COLERIDGE, C.J. The false pretence alleged in the fourth count is that the defendant "Isaac Gordon was prepared to pay to them or one of them the sum of one hundred pounds, by means of which said false pretence the said Isaac Gordon did then unlawfully and fraudulently induce the said Richard Summers Brown and Richard Brown to make a certain valuable security, to wit, a promissory note for one hundred pounds, with

(1) 1 Dears. & Bell, C. C. 307.

intent" to defraud. Two objections have been made. First, that we must interpret the allegation that he was prepared to advance 100*l.*, as if it meant that he was ready to do so at some future time, and that it was a mere statement of his intention that at some time afterwards he would deliver the 100*l.* I do not think that is the true interpretation of the pretence which is stated to be false. I am far from saying that on more consideration much may not be found in the suggestion of my brother Wills in the course of the argument, but that has not been argued out, and I base my judgment on a broader and less refined ground. It appears to me that the ordinary meaning of the allegation is: "I am *now* prepared to give you 100*l.* if you will sign this paper. Here is 100*l.*, and when you sign that paper, which you will do in a moment, the 100*l.* is yours." That, apart from all question of existing state of mind, seems to me to be a false pretence of an existing fact—the existing fact stated being that the money was ready for the prosecutors on their signing the paper. That was untrue, and untrue to the knowledge of the defendant, and it is clear that the promissory note was obtained by means of it. So the first objection to the fourth count fails.

Next it was argued that, on the construction of the Act, this promissory note was not a valuable security because it was not of value until delivery to the defendant, and it required something to be done by him to make it of value. *Reg.* v. *Danger* (1) was cited in support of that contention, and we should treat that decision, I trust, with proper respect. But it seems to me that the words of 24 & 25 Vict. c. 96, which, as we know historically, was passed because of *Reg.* v. *Danger* (1), clearly apply to the present case. Sect. 90 enacts that "whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to *make* . . . . any valuable security," shall be guilty of the offence created by that section, and be liable to a certain punishment. I think that the terms of the Act are exactly fulfilled, and that there is no valid objection to the fourth count, and the indictment can be sustained.

(1) 1 Dears. & Bell, C. C. 307.

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MATHEW, J. I am of the same opinion. We are asked to declare the fourth count bad. But the phrase that the defendant "was prepared" indicates an existing intention as distinguished from one that is prospective only. Then we are pressed with *Reg.* v. *Danger* (1), which seems to have decided that under the statute of 7 & 8 Geo. 4, c. 29, s. 53, the negotiable security must be a valuable security prior to delivery. Ought we to place the same construction on this statute passed after that decision, and which declares it to be an offence to induce another by a false pretence "to make" a valuable security? I think not.

CAVE, J., concurred.

WILLS, J. I am glad that it is possible to support the conviction without venturing on the somewhat dangerous ground to which I referred in the course of the argument, and rendering it necessary to distinguish between a pretence to do something, and a statement of intention. I find it difficult to see why an allegation as to the present existence of a state of mind *may* not be under some circumstances as much an allegation of an existing fact as an allegation with respect to anything else. For example, suppose that by an arrangement for the settlement of litigation, a man was to pay a sum of money, and when the time came he said: "I shall not pay until I know that A. has the intention of acceding to this arrangement. I do not insist upon having his promise. I shall be content if I know what his present intention is. Otherwise I shall not pay." Suppose B., who was to get the money, then told him that A. had that intention, and he believed B. and paid the money upon the faith of B.'s assurance, and all the while B. knew that A.'s intention was exactly the contrary to what he had stated. I should have thought that the allegation as to A.'s intention was one of an existing fact, capable of supporting an indictment for obtaining money by false pretences. But I am very sensible that in such an inquiry there must always be a danger of confounding intention with a representation or a promise as to something future; and I am very glad that it is possible, for the reasons given by my Lord, to

(1) 1 Dears. & Bell, C. C. 307.

affirm this conviction without approaching any such debateable ground.

GRANTHAM, J. I am of the same opinion.

Conviction affirmed.

Solicitor for prosecution: *Tree & Son.*
Solicitor for defendant: *J. B. Matthews.*

J. R.

THOMPSON *v.* ADAMS.

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June 18, 20.

Insurance, Fire—Slip of Policy, Effect of.

The plaintiffs, a firm of merchants in New Zealand, in October, 1886, employed a firm of insurance brokers in London to effect for them insurances against fire upon goods in New Zealand. The brokers instructed B., an insurance broker at Lloyd's, to effect a portion of the insurances, and B. prepared a slip containing particulars of the risk, which was initialed by the defendant and other underwriters at Lloyd's. Owing to a misunderstanding between the insurance brokers no policy was put forward for signature by the defendant and the other underwriters, and in February, 1887, the goods in New Zealand were seriously damaged by fire. No premiums had then been paid, but two days after the fire the insurance premiums were paid by the plaintiffs to the insurance brokers. A policy was then tendered to the defendant for signature, but he refused to sign it or to pay the amount for which he had initialed the slip. In an action to recover the amount:—

Held, that the slip formed a complete and binding contract of insurance, that it was not subject to an implied condition that a policy should be put forward for signature within a reasonable time, and that, in the absence of circumstances shewing an intention on the part of the plaintiffs to abandon the insurance, they were entitled to recover.

ACTION tried before Mathew, J., without a jury.

Finlay, Q.C., and *Tindal Atkinson*, for the plaintiffs.
Barnes, Q.C., and *F. W. Hollams*, for the defendants.

The facts of the case and the arguments sufficiently appear in the judgment.

MATHEW, J. This was an action brought to recover the sum of 100*l.*, which it was alleged by the plaintiffs the defendant had agreed to cover by an insurance against fire upon the goods of the plaintiffs in premises of theirs in New Zealand. The action

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was resisted on the ground that there had been no contract of insurance, or, in the alternative, if there had been a contract of insurance, that it was subject to conditions which had not been fulfilled, and therefore that the underwriters were not liable.

The plaintiffs are merchants carrying on business in New Zealand, and they were represented in this country by a firm of Geard & Sons who acted for them under a power of attorney. They instructed Geard & Sons to effect insurances upon goods on their premises in New Zealand, and Messrs. Geard & Sons for that purpose about the month of October, 1886, placed themselves in communication with a firm of insurance brokers of high standing, Messrs. Collins & Co., who undertook to endeavour to effect insurances to the amount of 20,000*l*. Now, insurances had been effected in the same way previously, and amongst the insurances previously effected were some at Lloyd's. It appears within the last four or five years the underwriters at Lloyd's have undertaken, in addition to their ordinary business, the business of insurances against risks on land—against fire risks—and insurances had for this period been effected at Lloyd's by Messrs. Thompson, and Mr. Adams the present defendant, it appeared, had taken a line on some of the previous policies. Messrs. Collins & Co. not being members of Lloyd's, had placed themselves in communication with Mr. Bray, an insurance broker, who was entitled to effect insurances at Lloyd's, and Mr. Bray, in accordance with the usual course of business, prepared a slip containing the particulars of the proposed insurances and shewing the risk in the same way as if it were a marine risk to the underwriters at Lloyd's. Amongst others the risk was shewn to the defendant, who initialed the slip on his own behalf and on behalf of others whom he represented for 300*l*., of which 100*l*. represented the amount of his insurance.

In the ordinary course with reference to risks of this description, as well as with reference to maritime risks, the slip is followed by a policy of insurance. In the particular case the slip was initialed in October, 1886. The policy ought to have been put forward through the broker and signed by the underwriters, but, strange to say, no policy was tendered for signature down to the end of the month of February following. On

February 28, news reached this country that the premises of the plaintiffs had been burnt down on the previous day and a quantity of their goods destroyed. Up to this time, as no policy had been issued, no premiums had been paid, but upon March 1 the premiums upon all the insurances were paid by the plaintiffs to Messrs. Collins & Co. The defendant, however, with other underwriters, refused to accept the premium or to sign a policy or to pay the amount for which the slip had been initialed. Upon that the claim was put forward against the defendant upon the slip, and it was asserted by the plaintiffs that the slip was a sufficient insurance under the circumstances, and that the fact that no policy had subsequently been signed was immaterial. The defendant set up as a defence the absence of the policy and declined to pay. Under those circumstances it was that the action was brought against him.

Now several lines of defence were adopted by the defendant before me, and were argued with great ability on his behalf. In the first place it was said there was no policy of insurance. In the second place it was said, as I have already mentioned, that if there were any contract of insurance, it was a contract subject to the condition that a policy should be subsequently issued. Thirdly, it was said that in the particular case the conduct of the plaintiffs and their agents shewed that they had abandoned the insurance, and elected not to complete it by a policy, and therefore that the defendant was not liable. It was said that it was a breach of good faith on the part of the plaintiffs to put forward a policy which never would have been put forward if the fire had not occurred. Those were the three lines of defence which were adopted. With reference to the first ground of defence, a curious suggestion was made. To establish the proposition that there was no contract of insurance, reliance, in the first instance, was placed on the terms of the slip, and it appears, on examining the slip very carefully, the letters "N. E." had been inserted after the initials of the defendant, and it was said for the defendant that "N. E." means "not entered," and "not entered" means "not accepted," and therefore, on that ground, the slip was not binding. I have had a body of evidence laid before me with reference to this point on both sides, and the conclusion to

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which I have come is that this first point was only an ingenious suggestion of counsel, because, strange to say, the plaintiffs' witnesses and the defendant's witnesses all agreed that "N. E." meant "not entered," and that "not entered" meant not entered in the rough book, and was a private memorandum of the defendant, and, in point of fact, the initials in question were not intended to have any operation whatever in limiting or altering the liability of the underwriters. Therefore, those strange letters which gave us so much trouble for a little time may be laid aside. Their presence perhaps explains what I shall have to refer to subsequently, namely, the delay, because it appears that the "N. E." indicated that no record was made in any book of the underwriter, and the fact that no such record was made perhaps led to his not noticing that the policy had not been put forward in the ordinary course. So much for the first matter.

Then we come to the second defence, which was clearly an ingenious and interesting defence offered on behalf of the underwriters at Lloyd's. It was said that this alleged contract was only to be gathered from the slip initialed by the underwriters, but that the slip was no contract; that it was only an honorary undertaking on the part of the underwriters to make a contract subsequently, and that being so the underwriters chose in the present case not to be bound by it. It was alleged that it was right and fair under the circumstances that they should not be bound by it, and that, therefore, there was an end of the matter. I had evidence laid before me with reference to this curious point, for it strikes one at first glance that it was certainly a most extraordinary course of business that the underwriters were setting up. They were suggesting that it should be taken that this slip was procured, not for the purpose of securing protection to the assured, but of getting a piece of paper with some writing upon it which had no meaning whatever in point of law. That did not seem very likely. One knows how important it is that there should be a prompt insurance in respect of goods against fire risks. Considering how great the risk is to an individual, and how small a premium he has to pay, the great object is to get himself insured against damage by fire, and according to this theory no man could effect a prompt insurance at Lloyd's against

damage by fire. There must be an interval between the slip and the subsequent policy, and that interval would leave the underwriter free, if he thought proper not to accept the risk. Approaching the consideration of the evidence by the light of common sense, I was prepared for the result. The plaintiffs' witnesses all said that the slip was a contract and regarded as a binding legal contract to effect a subsequent insurance. There is no statutory difficulty in the way, and no reason why the slip should not be a binding contract, and there is every reason for supposing that such would be the intention of the person presenting the slip to be initialed in respect of the risk. On the other hand there was the evidence of the underwriters, and the underwriters sought to set up a custom to treat these slips as honorary undertakings only. It has become manifest that they could not rely upon a single fact to prove the existence of the alleged custom, and that they were only treating me with what a judge has so often to hear, an opinion—a strong opinion—of the witnesses on the one side as to the merits of the case, and of what the result of the litigation ought to be. All these gentlemen thought it was very wrong under the circumstances of this case that this slip should be anything more than an undertaking, out of which the underwriter could get if he thought fit. Some light was thrown upon the value of their opinion by the evidence of one of the principal witnesses, who said: "I regard this slip against fire risks in the same way as a slip against marine risks, and a slip against marine risks is only an undertaking in honour, because the statute forbids that it should be more, and I consider the statute applies to an insurance against fire, and therefore it is to be treated exactly as the same thing, and that is the custom at Lloyd's." Unfortunately the reasoning broke down, because the statute does not apply, and there is no reason why a contract should not be entered into by the slip; there is every reason, indeed, to suppose that the parties would intend it to be a contract, and upon that point I am against the defendant. I think there was a binding contract to insure, and that the contract contained in the slip is not one from which the underwriter could escape on the ground that it was only optional whether or not he should go on with the contract, and perfect it by a policy of insurance.

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Then there was an alternative point, and it was the one to which Mr. Barnes bent all his energy; he said, assuming that this slip is to be treated as a protecting note, like that which is ordinarily issued by an insurance company (for insurance companies recognise the necessity for prompt insurance, and before the policy is issued they will issue a protecting note which will have all the effect of a policy until the document has been prepared), still there ought to be read into this slip an implied condition. An implied condition is a condition to be proved by circumstantial evidence, not by anything that passes in a particular case in terms between the plaintiff and the defendant, but a contract to be inserted because the conduct of the parties shews it is the basis of the whole arrangement. The proviso, said Mr. Barnes, that I ask to read in is this: the contract contained in the slip is to be upon the condition that within a reasonable time the policy is put forward for signature, and if it be not put forward within a reasonable time, the insurance is to be at an end. That was the proviso that I was asked to insert, as it were, in this slip, and really the sole ground upon which that argument rested appeared to me to be that there is an interval ordinarily between the date of the slip and the time when the policy is sent. The course of business is that after the slip has been completely initialed, the policy should be prepared by the broker (Mr. Bray in this case) and submitted to the different underwriters, and when they have signed the policy, as a matter of business, the amount of premium appears for the first time in the accounts, and the contract is supposed to be complete in all formal particulars. Now, that is inevitable. That delay between the slip and the policy it is impossible to avoid. In the first place it is not because a particular underwriter initials a slip that the matter is completed at Lloyd's, or completed anywhere else. The broker has to go round and get all the risk covered, but, further he has to obtain in many cases precise information as to the nature of the risk—what is called technically the wording—and when the property insured is property abroad the interval would be longer necessarily than if it were at home. On this point again I had a great body of evidence laid before me on each side. The plaintiffs' witnesses said the delay is nothing;

the matter is complete when the slip is initialed. That is the business view of the affair. The underwriters are none the worse off for any delay; they very often do not trouble themselves very much as to the time the policy comes forward; and in support of that view the plaintiffs produced a number of slips, some initialed by the defendant himself, in which it appeared there had been a long interval, of weeks and months in some instances, between the date of the slip and the date of the policy. On the other hand witnesses were called for the defendant, who said that the understanding was that the policy was to be put forward promptly, and if it was not put forward, the transaction ought to be regarded as being at an end. But, again, no single instance could be adduced by any of those witnesses to throw light on a supposed course of business, and I am satisfied that the defendant's contention upon this point is wrong.

See what the consequences would be of adopting their view, if such a clause was to be written into the policy. There must necessarily be an interval of time between initialing the slip and the completion of the policy, during which preparations would be made for laying the policy before the underwriters for their signature. What is the position of the underwriter meanwhile? Clearly he is on the risk. Then, according to the argument, if the policy be put forward within a reasonable time he is bound to sign it, legally bound to sign it. Then in the interval he is upon the risk—but according to the defendant's argument this proviso would enable the assured at the expiration of a reasonable time to be off. Having kept the underwriter on the risk and the interval being so ended, he could say I avail myself of that proviso which is to be treated as part of the slip and I get rid of my liability to pay the premium. When the defendant's witnesses were examined, they were compelled to prove a course of conduct which was totally inconsistent with such a state of things, because it was proved that when there was delay repeated demands were made by the underwriters themselves as to the reason for the delay. There was one answer of the defendant which really put him out of court on this matter. He was asked, "Now, if no fire had occurred in this case, and the premium had been tendered to you in the month of February,

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would you have taken it?" "Yes," he said, "I should have regarded the tender of the premium as an indication of good faith, and I should have signed the policy."

That seems to me to make an end of that point which had been made by the defendant. From the evidence I find, as a fact, that there is necessarily an interval between the slip and the policy in all these cases; and I am satisfied that it would be most unreasonable to read such an implied contract into the slip (1). There must be judgment for the plaintiffs upon the issues tried before me.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Phelps, Sidgwick, & Biddle.*
Solicitors for defendants: *Hollams, Son, Coward, & Hawksley.*

W. J. B.

June 20

[IN THE COURT OF APPEAL.]

EDEN *v.* RIDSDALES RAILWAY LAMP AND LIGHTING COMPANY, LIMITED.

Company—Director—Gift by Promoter—Contract pending between Company and Promoter—Fiduciary Position of Director—Extent of Liability.

A gift by a promoter of a company to a director whilst there are any questions open between the company and the promoter, must be accounted for by the director to the company, and the company has the option of claiming the thing given or its highest value whilst held by the director.

THIS was an action to recover fees alleged to be due to the plaintiff as director of the defendant company. The defendants disputed their liability, and further raised, by way of counterclaim, a claim to a declaration that the plaintiff was a trustee for the defendants of 200 shares of the company standing in his name, or of their value, at the election of the defendants, and to an order that the plaintiff should account for the value of the shares estimated at the time of obtaining the same, or at such other time as the Court should think fit.

(1) The learned judge then proceeded to examine at length the evidence, from which he drew the conclusion that there had been no bad faith on the part of the plaintiffs, and no intention on their part to abandon the insurance, but it is unnecessary to set out that portion of the judgment in this report.

The company was formed in December, 1889, for the purpose of purchasing a lamp business and the premises on which the works were carried on, the promoters being two persons of the name of Flatau and Elborough. The former purchased the business of the owner, and entered into a contract to sell it to the company on certain terms. The plaintiff became a director of the company, and Flatau, at his request, before the terms of the contract for sale had been carried out, and while questions were pending with regard to it, transferred to the plaintiff 200 shares, which were thereupon registered in his name. The defendants at the trial produced transfers to shew that after the shares had been transferred to the plaintiff similar shares had reached par value, and they accordingly claimed £200. Grantham, J., who tried the cause decided in favour of the plaintiff on both claim and counter-claim, and gave judgment accordingly.

The defendants appealed.

W. Graham, and *A. Gwynne James*, for the defendants, after dealing with the claim of the plaintiff, contended that the defendants were entitled to succeed on the counter-claim. The contract between Flatau and the company was not complete, and the duty of the plaintiff was to act for the company in any questions that might arise on it. In such a case the company has a right to demand from the plaintiff anything which he has received from the promoter, or its value, at their option, and the value which they can claim is the highest value it attained while in the hands of the plaintiff.

Sidney Woolf, and *A. H. Carrington*, for the plaintiff, contended that as the contract for the sale of the business had been completed before the gift to the plaintiff, he was entitled to retain the shares.

W. Graham, replied.

[The following cases were cited: *Hay's Case* (1); *Carling's Case* (2); *McKay's Case* (3); *De Ruvigne's Case* (4); *Pearson's Case* (5); *Pulbrook* v. *Richmond Consolidated Mining Co.* (6);

(1) Law Rep. 10 Ch. 593.
(2) 1 Ch. D. 115.
(3) 2 Ch. D. 1.
(4) 5 Ch. D. 306.
(5) 5 Ch. D. 336.
(6) 9 Ch. 610.

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Nant-y-Glo and Blaina Ironworks Co. v. *Grave* (1); *Coventry and Dixon's Case* (2); *Clarke and Helden's Case* (3).]

LORD ESHER, M.R. This is an action brought by the plaintiff against the defendant company, of which he was a director, to recover fees which he alleged were due to him as director. The company not only traversed this claim, but they set up a counter-claim on the ground that the plaintiff, as director, was agent for the company, and that whilst he was agent he misconducted himself in a particular manner, so as to render him liable in damages. With regard to the claim, it appears that the plaintiff was appointed a director, and acted in that capacity, and no defence has been established to his claim for fees, so that he is entitled to recover the £200 which he claims. As to the counter-claim, the case stands thus. The plaintiff was appointed director before the contract which the company was formed to carry out was made, and at that time he had applied for and had allotted to him a sufficient number of shares to qualify him as director. Whilst he was in this position the contract was entered into, so as to become binding on the company, and there was nothing to complain of in the conduct of the plaintiff at that time. But the contract having been made had to be carried out, there were obligations on either side, and it was the duty of the directors to look to the interest of the company in carrying it out, and the duty of the plaintiff, as one of the directors and an agent for the company, to act for the company in all matters connected with the contract between the company and Flatau the other contracting party. Whilst things were in that condition the plaintiff suggested to Flatau that he, the plaintiff, was in an unfavourable position as compared with the other directors, to each of whom Flatau had given vendor's shares to the amount of their qualification, while the plaintiff had qualified himself, and thereupon Flatau gave the plaintiff 200 vendors' shares. The reason suggested for the gift was to put the plaintiff on the same footing as the other directors. They were given because he was an agent, and in the course of the carrying out of the contract. I do not say that the plaintiff took these shares from a man whose

(1) 12 Ch. D. 738. (2) 14 Ch. D. 660. (3) 37 L. T. 222.

actions he was, as agent for the company, bound to watch, upon any agreement, or even understanding that he was to betray his trust and act favourably to Flatau, that would probably be to go too far, further than the learned judge who tried the case has gone; but I do not hesitate to say that the plaintiff put himself in a position which the law does not allow an agent to assume. It was not that he intended to defraud his principals, but he put himself in a position of temptation to do so. The duty of an agent to his principal does not permit the agent to put himself in such a position, and if he does so he commits a wrong against his principal.

It has been argued that the cases which have been decided between a director and his company do not apply where there is, as here, a binding contract between the promoter and the company. It may be that none of the cases have been decided under such circumstances as the present, but this rule of law is applicable to all agents. In such a case the remedy of the principal is an option either to claim what the agent has received, or to sue for damages. If that which the agent has received is money he must hand it over to his principal, if it is not money, but something else, the principal may insist on having it, or, if he chooses, the value of it. An agent who has so failed in his duty ought to have at once informed his principal of the breach of duty. In such a case the principal would claim that which the agent has received, and would thus have an opportunity of selling at the highest value reached. So if the agent does not disclose the matter the value which the principal may claim is the value which he might have obtained for the thing at any time between the wrongful act and the time when it came to his knowledge. Applying this to the case before us the question is what was the highest value of the shares after the plaintiff acquired them, and before the disclosure of the facts. The burden of proof of value would be on the defendants, but if they give primâ facie proof then the onus would be shifted. Transfers have been put in shewing that the shares reached par value, so that the defendants are entitled to recover on their counter-claim the sum of £200. Under the circumstances there should be no costs of either claim or counter-claim, but the appeal has succeeded, and must be allowed with costs.

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LINDLEY, L.J. I am of the same opinion. The question on the counter-claim is, what are the rights of the defendants in respect of the 200 fully paid-up shares which the plaintiff received from Flatau. The position of affairs was this: Under the contract Flatau was entitled to a very large sum of money, and the company had nothing out of which to pay it. In that state of things Flatau gave the plaintiff 200 shares. It would, in my opinion, be contrary to all principles of law and equity to allow the plaintiff to retain the gift so made to him by Flatau. A gift by a promoter to a director whilst there are any questions open between the company and the promoter must be accounted for by the director to the company for whom he is an agent, and the company has the option of claiming what is given, or its value, i.e. the highest value whilst held by the director. The defendants, therefore, in this case are entitled to recover the shares or their value. The evidence shews that at some time or other the shares were at par, and that is, therefore, the value which the defendants are entitled to set on them and to recover. The appeal must succeed, and I agree with the Master of the Rolls as to the costs.

LOPES, L.J. I am of the same opinion. The important question in the case is that of the right of a director to retain a gift made to him by the promoter of a company. The result of the cases is that if a director receives a gift from the vendor at a time when the contract of sale is not completed he cannot retain it against the company, but must either hand it over to the company or pay its highest value. Here the plaintiff was agent for the defendants when he received the shares from Flatau, the contract was still incompleted, and questions might arise between Flatau and the company. Under these circumstances the plaintiff must account for the shares to the defendants. The value has been shewn from the transfers, and the defendants are entitled to recover that value. I quite agree on the question of costs.

Appeal allowed.

Solicitors for plaintiff: *Hatchett-Jones & Co.*
Solicitor for defendants: *Horace W. Chatterton.*

A. M.

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June 26.

Sheriff—Action against, for taking Defaulting Debtor to Prison within Twenty-four hours of Arrest—"Attachment for Debt," Meaning of—Punitive Character of Orders under Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5—*Consolidation Statute—Construction of Words applicable to former State of the Law—*32 *Geo.* 2, *c.* 28, *s.* 1—*Sheriffs Act,* 1887 (50 & 51 *Vict. c.* 55), *s.* 14 (1).

A judgment debtor arrested by the sheriff by virtue of an order under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for making default in payment of the debt, suffers imprisonment as a punishment for contumacious conduct, and is not a person arrested by virtue of an "attachment for debt" within the meaning of s. 14 (1) of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55). The sheriff need not, therefore, wait twenty-four hours after the arrest before taking such debtor to prison.

In re Ryley (15 Q. B. D. 329) considered.

Having regard to the fact that the Sheriffs Act, 1887, is a consolidation statute, s. 14 (1) being a re-enactment of 32 Geo. 2, c. 28, s. 1, the Court refused to put upon the words "attachment for debt" in the Sheriffs Act a construction which they did not otherwise properly bear, although by reason of alterations in the law between the dates of the two Acts it might be difficult in any other way to give effect at the present time to those words.

ACTION against the high bailiff of the Salford Hundred Court of Record for a breach of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 14 (1) (*c*) in taking the plaintiff to prison within twenty-four hours of his arrest. (1)

The trial took place before Manisty, J., and a jury, when evidence of the following facts was given on behalf of the plaintiff.

A judgment was recovered in the Salford Hundred Court of Record against the plaintiff for a sum of 31*l.* 1*s.* 4*d.*; and upon default by him in payment of the same, and proof of his having had sufficient means to pay, an order was made by the learned

(1) 50 & 51 Vict. c. 55, s. 14 (1): "Where an officer being a sheriff, under-sheriff, bailiff, serjeant-at-mace, or other officer whatsoever, arrests or has in custody any person by virtue of any action, writ, or attachment for debt, such officer shall not—

. . . .

"(*c*) take such person to any prison within twenty-four hours of the time of his arrest, unless such person refuses to be carried to some safe and convenient dwelling-house of his own nomination, not being the private dwelling-house of such person, and being within the borough or town where such person was arrested . . ."

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judge of that Court under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), that the plaintiff should be imprisoned for twenty-one days, or until he should pay the said sum. By virtue of that order the defendant caused the plaintiff to be arrested in London upon the evening of June 18, 1888, and taken to a police station. The plaintiff thereupon requested to be taken to an hotel for the night, but his request was refused, and he was kept for about four hours at the police station, and then taken in a cab to the St. Pancras railway station, whence he was conveyed by train to Manchester, and upon arrival there very early the following morning, he was forthwith lodged in the gaol.

It was admitted on behalf of the defendant that if s. 14 (1) of the Sheriffs Act, 1887, was applicable to the plaintiff's arrest, there had been an infringement of its provisions, for which the defendant would be responsible under that Act; but it was contended that the above section did not apply. At the close of the plaintiff's case Manisty, J., ruled that the order of commitment was not an attachment for debt within s. 14 (1), and he accordingly nonsuited the plaintiff upon the ground that the section was inapplicable.

The plaintiff now moved that the nonsuit should be set aside, or that a new trial should be had on the ground that the learned judge was wrong in so ruling.

Winch, Q.C., and *J. D. O'Flynn*, for the plaintiff. The Sheriffs Act, 1887, is a consolidating Act, and s. 14 (1) (*c*) is a similar provision to that in 32 Geo. 2, c. 28, s. 1, which is repealed; but in the present Act the words "for debt" have been added to "attachment." It is submitted that unless the words "attachment for debt" apply to an order of commitment, such as this, under s. 5 of the Debtors Act, 1869, there is nothing for them to operate on, since imprisonment for debt in the ordinary sense has been abolished by that Act. Manisty, J., thought that this was a committal for contempt of court, and that therefore s. 14 of the Sheriffs Act, 1887, did not apply, and that the officer was bound to take the plaintiff to prison forthwith. But in the case of a committal for contempt the person committed must go before the Court to purge his contempt before he can get his release,

whilst in a committal for non-payment of a debt, s. 5 of the Debtors Act and the form of order expressly enable the debtor to free himself at any moment by paying the debt; see Form A. in the Schedule to the General Rules under the Debtors Act, 1869, and Form 55 in the Appendix to the County Court Rules, 1889. There is no power to make an order absolute for imprisonment for a time certain, and attachment for debt is not a process in contempt, but merely a means of enforcing a debt: *In re Ryley* (1). *Marris* v. *Ingram* (2) was relied upon by Manisty, J., as supporting his view, but that was a case of a default by a person in a fiduciary capacity (s. 4, clause 3), and the case was commented on by Bacon, V.C., in *Holroyde* v. *Garnett.* (3)

[They cited also *Ex parte Dakins* (4) and *Evans* v. *Wills.* (5)]

Ambrose, Q.C. (*A. J. David,* with him), for the defendant. Sect. 14 (1) (*c*) of the Sheriffs Act, 1887, is a re-enactment of 32 Geo. 2, c. 28, s. 1, and that section only applied to arrest upon bailable process and not to persons arrested in execution: *Evans* v. *Atkins* (6); Atkinson on Sheriffs, p. 310 (6th ed.). Sect. 16 of the Act of 1887 shews that when the legislature meant to deal with orders such as these it knew how to do so. The six cases in which by s. 4 of the Debtors Act, 1869, imprisonment for default in payment of a sum of money is still permitted, are all cases in which, by reason of some contumacy in the debtor, the law is allowed to take its course by way of punishment. The imprisonment is not a mere means of enforcing payment of a debt, but is for the punishment of fraudulent or dishonest debtors: *Marris* v. *Ingram.* (7) The cases upon s. 4 are reviewed in *In re Gent.* (8)

Winch, Q.C., in reply.

DENMAN, J. In my opinion my brother Manisty was right in the view which he took of this matter. I am going to decide the case on a very narrow ground. I am not prepared to say that if the provisions of s. 14 (1) of the Sheriffs Act, 1887, had been now for the first time enacted, there would not have been much more to be said for the plaintiff's contention. But that Act is a

(1) 15 Q. B. D. 329.
(2) 13 Ch. D. 338.
(3) 20 Ch. D. 532.
(4) 16 C. B. 77.
(5) 1 C. P. D. 229.
(6) 4 T. R. 555.
(7) 13 Ch. D. 338.
(8) 40 Ch. D. 190.

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consolidating Act, which repeals a quantity of Acts relating to sheriffs with the intention of re-enacting their provisions, and I cannot discover any tangible distinction between s. 14 (1) and the words used in the former statute 32 Geo. 2, c. 28, s. 1. The provisions of the two sections are substantially the same, and were probably intended to have the same effect, and afford the same protection to persons under arrest. To my mind it does not matter that between the time of the passing of the earlier Act and the passing of the Act of 1887 certain alterations in the law of imprisonment for debt have taken place making it difficult if not impossible to apply the language used to the new state of things. I do not think, at all events, that that is by any means conclusive. Looking at the way Consolidation Acts are passed, I do not think that that consideration ought to cause us to construe the present Act so as to include a new state of things, which, if one regards the words fairly, and with a desire to put a meaning upon them, does not come within the proper meaning of the enactment.

Now the material words of s. 14 of the Sheriffs Act, 1887, are: "Where an officer being a sheriff," &c., "arrests or has in custody any person by virtue of any action, writ, or attachment for debt, such officer shall not— . . . . (c) take such person to any prison within twenty-four hours of the time of his arrest," and so forth. The decision here must turn upon the meaning of the words "attachment for debt;" and unless the plaintiff brings his case within those words he cannot succeed. I do not think that in this case the attachment was for debt within the meaning of the enactment; and for this reason, it was for debt and a good deal more. The attachment could not have been ordered but for a great deal more than the mere fact that the plaintiff owed the debt. He could not have been committed unless an order had been made upon him for the payment of the debt, and unless also it was established that between the time when the order was made and the time fixed for payment the plaintiff had money with which he could have paid the debt, yet wilfully and wrongfully withheld payment. In my judgment, when the statute uses the words "attachment for debt" it means something very different to such an attachment as this.

Even if it is impossible, or very difficult, now to apply those words "attachment for debt" to anything unless they are made applicable to attachments of this description, I do not think the Court would be justified in so construing this enactment. On that short ground I think the learned judge was right in his decision, and this motion must therefore be dismissed.

CHARLES, J. The question which we have to decide is, whether this order of committal under the Debtors Act, 1869, is an attachment for debt within s. 14 (1) of the Sheriffs Act, 1887. The Act of 1887 was a consolidating statute, and although, notwithstanding that, it may have introduced amendments, still this is not probable, for the intention undoubtedly was simply to consolidate the provisions of the earlier Acts, and s. 14 (1) is a re-enactment of 32 Geo. 2, c. 28, s. 1. That section provides that no sheriff or other officer shall carry any person by him arrested by virtue of any "writ, process, or attachment" to any gaol or prison within four-and-twenty hours from the time of the arrest, &c. It is quite true that in the present Act the words are "attachment for debt;" but looking to the preamble of the old Act, and to the case of *Evans* v. *Atkins* (1) there can be no doubt that that Act meant attachment for debt, and putting that meaning upon it the Act of 1887 is a mere re-enactment of it. Between the time when the earlier Act passed and the passing of the Act of 1887 the Debtors Act, 1869, has, with certain exceptions, abolished imprisonment for debt. It has been argued by Mr. Winch that there is nothing for the words "attachment for debt" in s. 14 (1) of the Act of 1887 to operate on except an order committing a debtor for default in payment of a sum of money which he has been ordered to pay under the judgment of a competent Court. I quite admit the force of that argument, for it is our duty to give effect so far as possible to the words. It may be difficult to find circumstances which would exactly fit those words in the present state of the law with regard to imprisonment for debt; but I do not think that that is conclusive.

It seems to me that this attachment was for much more than a debt. Under s. 4 of the Debtors Act, 1869, there are six excep-

(1) 4 T. R. 555.

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tions from the provision for the abolition of imprisonment for default in payment of a sum of money; viz., (1) Default in payment of a penalty; (2) Default in payment of a sum recoverable summarily before a justice of the peace; (3) Default in payment by a person acting in a fiduciary capacity; (4) Default in payment by a solicitor guilty of misconduct or ordered to pay as an officer of the Court; (5) Default in payment of a portion of salary or income for the benefit of creditors where an order in bankruptcy may be made; and, lastly, (6) The default here in question, that is, default in payment of a sum in respect of which orders are by the Act authorized to be made. Sect. 5 authorizes any Court to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of a debt, or instalment of a debt due from him in pursuance of an order or judgment of that or any other competent Court. But it provides that that power is only to be exercised when the person making default either has or has had since the date of the order the means to pay the sum. In other words the power is only to be exercised where the Court can see that the person has been guilty of a wilful contumacious refusal to pay the money.

In *Dillon* v. *Cunningham* (1) it is pointed out by Kelly, C.B., that the jurisdiction mentioned in s. 5 is a jurisdiction to commit, and is quite independent of the jurisdiction to make an order for payment, which last can be made without any proof of the debtor's means. It is only when you come to inflict upon the debtor the penalty of committal that it is necessary to prove that he has, or has had, the means to pay. It is said on behalf of the plaintiff that in spite of all that the commitment is a mere attachment for debt, because the judgment debtor can get rid of the attachment by payment of the amount of the debt. To be accurate, he can only get rid of it by payment of the debt and costs. The form of order which is attached to the County Court Rules, 1889 (2), which have statutory authority, shews plainly how the debtor can get rid of the attachment. The order of commitment requires the high bailiff to deliver the defendant to the custody of the governor of the prison, and requires the governor to safely

(1) Law Rep. 8 Ex. 23. (2) Form 55 in the Appendix.

keep him in the prison "for —— days from the arrest under this order, or until he shall be sooner discharged by due course of law." I quite agree that ordinarily a person cannot purge himself of contempt without some action of the Court itself. But Parliament can point out a way in which this may be done, and in this case it has prescribed what shall be due course of law; viz. either remaining in prison until the determination of the sentence or else paying the money with the costs. In either of those methods the debtor can escape the further consequences of his misconduct.

Sir George Jessel, M.R., said in *Marris* v. *Ingram* (1) that under the Debtors Act, 1869, imprisonment is intended as a punishment for misconduct, and the Act is none the less penal because by payment the debtor can purge his contumacy. The word "contumacy" is, perhaps, more appropriate to such conduct than the word "contempt," because that may be confused with contempt in the face of the Court. It certainly seems to me that an order of commitment under the Debtors Act is punitive in its character, although it can be got rid of by a money payment. *Marris* v. *Ingram* (1) was under sub-s. 3 of s. 4, but I see no difference in this respect between sub-s. 3 and sub-s. 6. With regard to sub-s. 4, my brother Denman has referred me to a case of *In re Wray* (2), in which North, J., considered that he had jurisdiction to make an order for commitment against a solicitor, on the ground that the process was not merely a civil process. The learned judge there declined in his discretion to make the order, and in the Court of Appeal Cotton, L.J., said that if the learned judge had declined jurisdiction that would have been something from which an appeal could be successfully asserted. That seems to be an authority with regard to sub-s. 4 of s. 4. The only case which appears to be contrary to this view of the Debtors Act is *In re Ryley* (3). In that case Cave, J., undoubtedly says, speaking of rule 1 of the County Court Rules, 1884, that it shews that the order of commitment is not a process for contempt, but is simply a method of enforcing payment of a debt. That is certainly an authority for Mr. Winch's contention. But the

(1) 13 Ch. D. 338. (2) 36 Ch. D. 138.
(3) 15 Q. B. D. 329.

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decision in that case can I think be well supported upon another ground, because the decision was upon s. 9 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which in express language provides that on the making of a receiving order no creditor shall have any remedy against the property or person of the debtor in respect of his debt. That is enough to justify the decision of Cave, J., in that case. But if it is necessary to distinguish between Mr. Justice Cave's description of the process of commitment and that of Sir George Jessel, M.R., and North, J., in the two cases I have referred to, I must say, with deference to my brother Cave, that I prefer the latter. It seems to me that, having regard to the whole history of legislation, to the language of the Act of Parliament, and to those two decisions, we ought to support the ruling of my brother Manisty.

Motion dismissed.

Solicitors for plaintiff: *Paterson & Sons.*

Solicitors for defendant: *W. H. Herbert, for J. Harvey Simpson, Manchester.*

P. B. H.

June 28.

SMITH *v.* WOOD.

Statute—Construction—Metropolis Coal Act (1 & 2 *Wm.* 4, *c. lxxvi.*), *s.* 57—*Penalties for Sale of Coal deficient in Weight—Non-compliance with Statutory Method of Weighing.*

The plaintiff purchased coal from the defendant in London, and upon delivery of the same requested the defendant's carman to weigh the sacks in which it was contained. The carman weighed the sacks by putting each of the full sacks in one scale and an empty sack together with the weights in the other scale. In an action for penalties under the Metropolis Coal Act (1 & 2 Wm. 4, c. lxxvi.), s. 57, in respect of a deficiency of weight in the sacks so weighed:—

Held, that as the method of weighing prescribed by the section,—viz., weighing all the sacks "both with and without the coal therein"—had not been followed the plaintiff was not entitled to recover.

Meredith v. *Holman* (16 M. & W. 798) followed.

ACTION to recover penalties under the Metropolis Coal Act (1 & 2 Wm. 4, c. lxxvi.), s. 57 (local), from a vendor of coals for delivering sacks deficient in weight. (1)

(1) 1 & 2 Wm. 4, c. lxxvi., s. 57: "Such purchaser or purchasers, or his, her, or their servant or servants, or other person or persons as aforesaid, so desiring such coals contained in such cart, waggon, or other carriage

The case was tried before Wills, J., and a jury, when the plaintiff gave evidence of the following facts:—

The plaintiff ordered from the defendant, who was a coal merchant, one ton of coals to be delivered at the plaintiff's house in London. Ten sacks of coal, each of which should have contained 224 lbs., were accordingly sent to the plaintiff by the defendant from one of his warehouses or depôts in London in a cart which was in charge of one of his carman. The plaintiff required the carman to weigh seven of the sacks in the presence of a constable of the Metropolitan police whose attendance was duly procured by the plaintiff. The seven sacks were thereupon weighed by the carman, but instead of weighing each sack with the coal in it first and then weighing the empty sack by itself, the carman placed each sack containing the coal in one scale of the weighing-machine, and an empty sack together with the weights in the other scale. It was ascertained by such weighing that neither of the said sacks contained 224 lbs. net of coals when weighed. The plaintiff therefore claimed to be entitled to penalties in respect of the deficiency in each of such sacks. It was contended on behalf of the defendant that a condition precedent to the right to recover the penalty had not been complied with, inasmuch as the carman, not having been asked by the

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to be weighed, shall, and he, she, or they is and are hereby required to procure the attendance of some constable, police officer, or other indifferent and credible person, to be present at the weighing of such coals; and all the said sacks, both with and without the coals therein, shall accordingly be weighed with the said machine by the carman or other person attending such cart, waggon, or other carriage, in the presence of the purchaser or purchasers of the said coals, or of his, her, or their agent or servant, agents or servants, if they or any of them shall attend to see the same weighed, and of such constable, police officer, or other person;" . . . . "and in case such carman or other person shall refuse or neglect to weigh such sacks, or any of them, in manner aforesaid, he shall forfeit and pay for such offence any sum not exceeding ten pounds; and the constable, police officer, or any other person who may be present may weigh the said sacks, or any of them, as aforesaid; and in case upon the weighing of any such sack it shall happen that any sack or sacks shall not contain either one hundred and twelve pounds or two hundred and twenty-four pounds net of coals, as the case may be, then and in every such case the seller or sellers of such coals shall for every such sack of coals that shall be so found deficient forfeit and pay any sum not exceeding five pounds."

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plaintiff so to do, did not weigh the sacks "both with and without the coals therein" as required by 1 & 2 Wm. 4, c. lxxvi., s. 57. The learned judge overruled the objection, and the jury having found that the sacks were deficient in weight, and having fixed the penalties at 10*l.* 10*s.*, judgment was given for the plaintiff for that amount. The defendant now moved to have the judgment entered for him, on the ground that the plaintiff's evidence failed to establish a cause of action under the statute.

Cock, Q.C., and *Chester Jones*, for the defendant. It is admitted that when the coal was sent out by the defendant it was correct in weight, and it does not appear how the missing portion was abstracted. The only point is whether the plaintiff has brought herself within 1 & 2 Wm. 4, c. lxxvi., s. 57, which points out a particular method in which the sacks are to be weighed, viz., "both with and without the coals therein." Here the sacks were only weighed with the coals in them. The penalty is inflicted when the sacks do not contain the prescribed "net" weight, that is after deduction of the tare, and when a sack is "*so* found deficient," that is, when weighed in the prescribed method. This is a penal statute, and the authorities shew that such provisions must be construed strictly: *Vaux* v. *Vollans* (1); *East India Interest Case* (2); *Fletcher* v. *Lord Sondes* (3); *Lord Huntingtower* v. *Gardiner*. (4)

J. B. Walker, and *Bassett Hopkins*, for the plaintiff. It is unreasonable that a provision meant wholly for the protection of the purchaser should be construed so as to exculpate the vendor, however negligent he may be. The request to the carman to weigh was a request to weigh the coal according to law; he was master of the position. If the construction contended for on behalf of the defendant is adopted it will enable a dishonest carman to shield a dishonest employer. In the *East India Interest Case* (2), it is said that the intent of the legislature is to be collected from a general view of the whole Act, not from any particular expression.

(1) 4 B. & Ad. 525.
(2) 3 Bing. 193, 196.
(3) 3 Bing. 501, 528.
(4) 1 B. & C. 297.

Cock, Q.C., in reply. *Meredith* v. *Holman* (1) is a direct authority that the method of weighing here adopted was not a compliance with this statute, and although that case was under s. 54, that section and s. 57 are in pari materiâ. If the carman had been asked and had refused to weigh the sacks in the prescribed manner, he would himself have been liable, under s. 57, to a penalty which would have been recoverable from his employer under s. 81.

DENMAN, J. It is clear that *Meredith* v. *Holman* (1) is an authority upon s. 57 of this Act. There the first count was founded upon a deficiency in the weight of the sacks of coal, rendering the seller liable to penalties, and there was the same neglect of the carman to weigh the sacks when empty as well as full. It is quite true that in that case the counsel who shewed cause against the defendant's rule admitted that the point was unarguable, and that the defendant was entitled to succeed upon that point, but the reporter, as appears from the marginal note, evidently thought that the Court decided the point. It must be taken, I think, that four learned judges so decided under s. 54, and it is clear that they could not have arrived at that conclusion under s. 54 without coming to the same conclusion under s. 57. I say nothing as to the intention of the Act, and the anomaly of allowing the seller to escape because his carman neglects to properly weigh the coals. It is enough to say that the words of the section are capable of the construction put upon them by the defendant; probably, indeed, that is the strict grammatical construction of them. Even if one could see one's way to escape that construction, it is impossible to my mind to escape from the decision in *Meredith* v. *Holman.* (1) It is a decision of the Court of Exchequer, which must bind us unless we can see that the words of s. 57 are not capable of the same construction. So far is that from being the case that it appears to me that that construction is the proper one. The words "so weighed," and "in manner aforesaid," clearly mean weighed in the manner pointed out by the section. The judgment for the plaintiff must therefore be set aside, and judgment entered for the defendant.

(1) 16 M. & W. 798.

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CHARLES, J. The report of *Meredith* v. *Holman* (1) shews that it must have been a decision upon the first count as well as the second. I have referred to the report of that case in the *Law Journal Reports* (2), and I find that it entirely agrees with the report in Meeson and Welsby. It appears that the learned counsel for the plaintiff admitted that on the first count the case was unarguable. They then argued upon the second count, and after proceeding for some time they gave up that also. Independently of the authority of that case I should have arrived at the same conclusion, but I am quite clear that we are bound by that decision.

Judgment for the defendant.

Solicitor for plaintiff: *S. Roberts.*
Solicitors for defendant: *Lewis & Sons.*

P. B. H.

June 20.

GIBSON *v.* EVANS.

Practice—Discovery—Libel—Action against Proprietor of Newspaper—Admission of Publication—Interrogatories as to Name of Writer of alleged Libel.

In an action of libel against the proprietor of a newspaper if the defendant admits the publication of the words complained of, the plaintiff is not entitled to interrogate the defendant as to the name of the writer of the words, unless the identity of such writer is a fact material to some issue raised in the case.

APPEAL by the defendant from an order of Pollock, B., at chambers, to whom a summons for a further answer to the plaintiff's interrogatories had been referred by a district registrar. The plaintiff, who was the proprietor and editor of a newspaper called the *Cambrian News and Welsh Farmers' Gazette*, sued for a libel upon him in the conduct of his paper, contained in a letter published in a newspaper called the *Goleuad*, of which the defendant was the editor and proprietor. The defence denied that the defendant wrote but admitted that he published the words complained of, and it alleged that the words did not refer to the plaintiff, and did not bear any defamatory meaning, and were privileged. The defence also alleged (inter alia) that upon the receipt of a complaint from the plaintiff the defendant published

(1) 16 M. & W. 798. (2) 16 L. J. (Ex.) 126.

in the next issue of his paper an apology which was set out in the defence. In this apology it was stated that the letter in question was written by one who lived at a distance, and who, it was believed, never saw the plaintiff's paper, and had no intention of referring to the plaintiff; and the defendant tendered his most complete apology to the plaintiff, and expressed regret that the letter had caused him pain.

The plaintiff administered interrogatories to the defendant, and by the second and sixth of such interrogatories the defendant was required to give the name and address of the person who wrote the letter, and the name and address of the person who, as alleged in the above apology, lived at a distance, and never saw the plaintiff's paper, and was the writer of the said letter. The defendant objected to answer these two interrogatories on the grounds that, as he had admitted the publication of the letter and thereby his responsibility for the same, the inquiries were irrelevant, and that they were not made for a bonâ fide purpose, and were an attempt to discover his evidence. Pollock, B., ordered that the defendant should make a further answer to the above interrogatories.

B. F. Williams, Q.C., and *J. Brýn Roberts*, for the defendant, argued that as the publication, and consequently the responsibility of the defendant were admitted, interrogatories as to the identity of the writer of the alleged libel were entirely irrelevant: *Hennessy* v. *Wright* (No. 2). (1)

[They were stopped by the Court.]

Abel Thomas, for the plaintiff. It is material for the plaintiff to know whether the writer of the letter meant it to apply to the plaintiff or not. It may be admitted that as a general proposition a plaintiff in libel is not entitled to this information where publication is admitted, but the cases where such interrogatories have been disallowed—as in *Hennessy* v. *Wright* (No. 2) (1)—have been cases where the proprietor of the newspaper has taken upon himself to justify, and it therefore became immaterial to find out who actually wrote the alleged libel; here the defendant has not set up a justification. The plaintiff must prove that the

(1) 36 W. R. 879.

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letter referred to him, and one mode of doing so will be to call the writer.

[LORD COLERIDGE, C.J. It does not signify what the writer meant. The question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff.]

The groundwork of the defendant's case is that the writer knew nothing about the plaintiff; the plaintiff is entitled therefore to destroy or weaken the defendant's case, as well as to maintain his own. *Marriott* v. *Chamberlain* (1) shews that the plaintiff is entitled to all that he now asks.

LORD COLERIDGE, C.J. I am of opinion that this appeal must be allowed. The action is for a libel contained in a letter in the defendant's newspaper. The defence is that the words complained of did not refer to the plaintiff, and that the defendant did not write, though he admits that he published them, and further that the words are not defamatory and are privileged. The defendant does not dispute liability if the words did refer to the plaintiff and are defamatory and not privileged. Further than this, the defendant has pleaded an apology, and certainly a fuller apology could hardly have been made. The question is whether in that state of things the plaintiff is entitled to ask the defendant who wrote the matter complained of. It is admitted that the decisions shew that interrogatories of this nature have been uniformly disallowed. With regard to authorities in equity, it has been pointed out by Lindley, L.J., in *Hennessy* v. *Wright* (No. 2) (2) that the question could not have arisen in those Courts because discovery was never granted in aid of an action of tort. But the plaintiff's counsel said that he could shew that this case was distinguishable, because he would be in a position to prove that the letter did refer to the plaintiff, and that it was so intended by the writer.

In my opinion that is not a valid distinction. In *Hennessy* v. *Wright* (No. 2) (2) this very inquiry was disallowed by the Court of Appeal. The plaintiff there said, "Tell me who made the reports and wrote the article complained of," and the Court said that he was not entitled to ask that; for the names of such

(1) 17 Q. B. D. 154. (2) 36 W. R., at p. 880.

persons were not material to enable him either to maintain his own case or to destroy his adversary's. The plaintiff's counsel has relied most strongly upon *Marriott* v. *Chamberlain* (1), but the circumstances of that case were very peculiar. There the libel complained of was a statement that the plaintiff had fabricated a story as to his having seen a copy of a certain letter, and the defendant admitted the writing and publication of the libel and justified it. Then the defendant said, it is part of my case that there is no such letter in existence as the plaintiff has referred to, and I have a right to interrogate the plaintiff in order to shew that there is no such letter; and the Court of Appeal held that the existence of the letter was a fact material to the issue raised by the plea of justification, and that, therefore, the right to interrogate arose. In circumstances such as those there is no doubt a right to interrogate upon the point, but that is a totally different case from the present. The order of my Brother Pollock must accordingly be reversed.

HAWKINS, J., concurred.

Appeal allowed.

Solicitors for plaintiffs: *Roberts & Evans*, Aberystwyth.

Solicitors for defendant: *Minshall, Parry-Jones, Woosnam & Smith, for R. Jones Griffith, Dolgelly.*

(1) 17 Q. B. D. 154.

P. B. H.

1889
June 20.

FLEMING *v.* DOLLAR.

Practice—Libel—Payment into Court with Defence denying Liability—Justification of Part of Words used and Payment into Court as to Remainder—Embarrassing Pleading—Rules of the Supreme Court, 1883, *Order* XXII., *r.* 1.

In an action of libel the defendant by his defence admitted the publication of the words but denied the innuendoes, and pleaded that to the extent of the facts thereinafter stated the words were true in substance and in fact. The defence then set out seriatim a number of facts, and finally contained an admission that the words were not wholly justified by the facts thereinbefore mentioned; and the defendant paid 40*s.* into court in satisfaction of the plaintiff's claim:—

Held, that this defence was bad, and, unless amended, must be struck out as contrary to Order XXII., r. 1, and also as being embarrassing, inasmuch as it left in doubt what the defendant justified and what he did not.

APPEAL by the defendant from the decision of Pollock, B., at chambers, affirming an order of the master ordering that unless the defence were amended by the defendant it should be struck out, as being contrary to Order XXII., r. 1. (1)

The plaintiff was consulting veterinary surgeon to the War Office, and the action was for libel contained in a letter published by the defendant in a newspaper called the *Sporting Life*.

The statement of claim alleged that this letter charged the plaintiff with having revived a discarded operation for a certain complaint in horses, and with having done so in consequence and in breach of a confidential communication made to him as to the result of investigations upon the subject by one Dr. C., and with having caused a subordinate of the plaintiff to commit an offence against the Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77), in the performance of such operation. It was further alleged therein that the letter charged the plaintiff with having wantonly

(1) Order XXII., r. 1: "Where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a judge pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (except in actions or counter-claims for libel or slander), pay money into court, which shall be subject to the provisions of rule 6 . . . ."

and recklessly and in violation of his duty as such consulting veterinary surgeon to the War Office caused another operation to be performed upon a large number of horses which were public property, to the injury and destruction of the same, and with knowledge that the operation was ineffectual and improper.

By the defence the defendant alleged that the plaintiff had put forward a claim to have made a new and important discovery of a cure for the said complaint in horses, and that the said claim had been made the subject of a public discussion in the newspapers. The defence then admitted the publication of the words complained of, but alleged that their fair meaning could not be arrived at without reading the context; and there was a denial of the innuendoes. Paragraph 3 was in the following terms: "Except as hereinafter admitted the defendant says that the said words were fair comment on a matter of public interest, and he says further that, to the extent of the facts hereinafter stated, the said words were true in substance and in fact." Each of the four following paragraphs began, "It is the fact that"—and the facts justified by the defendant were therein set forth seriatim.

In substance the facts thus alleged by the defendant differed but little from the allegations contained in the passages of the letter complained of set forth in the statement of claim; but the defendant stated that he did not allege that the plaintiff knowingly or wilfully caused a breach of the provisions of the Cruelty to Animals Act, 1876, or that the plaintiff knowingly or wilfully sacrificed the said horses, though the defendant did allege that the operations were mere experiments. Paragraph 8 of the defence was, so far as material, in the following terms:—"The defendant admits that in the heat of the said discussion . . . . he used words of the plaintiff, being the words complained of, which were not wholly justified by the facts hereinbefore mentioned, and cannot be considered in every respect as fair comment, and he now brings into court the sum of 40*s.*, and says that the same is sufficient to satisfy the plaintiff's claim."

Finlay, Q.C., and *R. M. Bray*, for the defendant. The order assumes that the defendant has paid money into court with a denial of liability as regards the same cause of action, but this is

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a mistake. By Order XXII., r. 1, the payment into court of a sum of money by way of satisfaction is only to be taken as an admission of the claim or cause of action "*in respect of which the payment is made.*"

The defence is not a denial of liability as to the whole of the statement of claim, but as to a part, and the payment into court is as to the remainder alone. It is like the case of a defendant charging the plaintiff with being a thief and a robber; in that case surely the defendant could plead that the first charge was true, whilst admitting that he was wrong as to the second, and paying money into court in respect of that?

[LORD COLERIDGE, C.J. Is not your pleading embarrassing?]

No, for it states expressly the facts upon which the defendant relies. If he had merely pleaded that the words were true in substance and in fact, he should have been bound to give those facts by way of particulars.

C. W. Mathews, (*Sir Edward Clarke, S.G.*, with him), for the plaintiff. If these are particulars they should be put in proper shape: Order XXXVI., r. 37. This pleading is a direct violation of Order XXII., r. 1, which was drawn to meet and alter the decision in *Hawkesley* v. *Bradshaw* (1) upon the previous rule, Order XXX., r. 1, of the Rules of the Supreme Court, 1875. Here the defendant has, in fact, made the payment into court in respect of the whole matter complained of, for the innuendoes are all that he has denied, except the allegations, not made in the statement of claim, that the plaintiff knowingly caused a breach of the Cruelty to Animals Act, 1876, or knowingly sacrificed the horses.

[HAWKINS, J., referred to *Mountney* v. *Watton* (2).]

The libel here is not divisible, and, even if it were, the defence has not made any division. Moreover, the defence is embarrassing.

Finlay, Q.C., in reply. In *Hawkesley* v. *Bradshaw* (1) the justification was pleaded to the same cause of action as the payment into court. The defendant has done all that can be required of him; he admits, in effect, that he cannot justify the whole of the words, and he has paid money into court in respect of the excess.

(1) 5 Q. B. D. 302. (2) 2 B. & Ad. 673.

[HAWKINS, J. What is the excess?]

It is impossible for the defendant to further dissect the damages.

[He cited also *Weaver* v. *Lloyd* (1).]

LORD COLERIDGE, C.J. This is a case of considerable importance, as raising a question of principle, and the point to be decided is, I think, new, though the principle governing it is old. The action is for libel, and there is an admission by the defendant that it cannot be justified. The defence, shortly put, is this. The defendant says, there are a number of facts against the plaintiff—his conduct, behaviour, and so forth, which I say are true; but I do not say that those facts would justify the whole libel, or the whole of the language used by me; therefore I plead the facts which justify some of my remarks, but I say that they would not cover the whole libel, and accordingly I pay 40s. into court for some portion of those remarks; I do not say what portion, but for whatever is unjustified I pay that sum into court." My brother Pollock struck out this defence upon the ground that it infringed Order XXII., r. 1, which lays down that you cannot in libel deny liability and pay money into court. This rule was directed against the decision of the Court of Appeal in *Hawkesley* v. *Bradshaw* (2), which was upon the corresponding rule, Order XXX., r. 1, in the Rules of the Supreme Court, 1875. The present rule was framed for the purpose of altering the construction rightly placed upon the earlier rule in that case. Now it is important to see exactly what has been decided by the cases upon this subject. Formerly the rule was that to the same libel and to the whole libel payment into court with a denial of liability was not allowed. The elaborate judgments of Bramwell, L.J., and Thesiger L.J., in *Hawkesley* v. *Bradshaw* (2), established that under Order XXX., r. 1, of the Rules of 1875, the defendant should not be in a worse position in libel than in other cases. But morally and practically there is a difference between libel and other cases. Thus, in an action for breach of contract, there is no reason why the defendant should not be at liberty to say, "I never made the contract, but if I did

(1) 2 B. & C. 678. (2) Q. B. D. 302.

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I say that 40*s.* is enough to satisfy your claim." But to permit a defendant, in cases where a question of character is involved, to say to the plaintiff, "Take 40*s.*, or go on with your action," is practically a very different thing. This being felt to be so, Order XXII. r. 1, was framed, and whilst it permits payment into court with a denial of liability in other actions, it excepts libel and slander. For the first time, we have in this case a pleading drawn with a view to evade, if possible, the operation of the rule. (In saying that I, of course, mean no reflection upon the pleader, for if it can be done it is perfectly justifiable.) The pleader has here done an ingenious thing. He says, in effect, "I justify nine-tenths of the libel, and if there is another tenth, I pay 40*s.* into court in respect of that."

Now it has long been held that a plea of justification to a part of a divisible libel is permissible. The view to that effect expressed in *Mountney* v. *Watton* (1) has been followed in other cases, one of which is *M'Gregor* v. *Gregory*. (2) If a man makes several distinct charges and he can prove that some are true, but cannot prove others, it is fair enough that he should divide them; therefore, he can pay money into court in respect of the latter. It is true that there are dicta shewing the intention of the Court not to permit this division; the case of *Reg.* v. *Newman* (3) affords an instance. I do not forget that that was a case of a criminal information, but the passage for which I refer to it deals with civil liability. Lord Campbell, C.J., there said (4), that the plea of justification is one and entire, and raises only one issue, and that unless the whole plea is proved that issue must be found for the plaintiff. That indicates the will of the Court not to allow the plaintiff to be embarrassed, and it put upon the defendant apparently rather hard measure, namely, that if his evidence shewed the truth of nine of the charges made by him against the plaintiff, but did not prove the tenth, his plea was not proved. That is strong ground for saying that upon principle and apart from the words of Order XXII., r. 1, the Courts would not tolerate a plea leaving in doubt what the defendant justified and what he did not. Admitting, therefore,

(1) 2 B. & Ad. 673.
(2) 11 M. & W. 287.
(3) 1 E. & B. 558.
(4) 1 E. & B., at p. 577.

that the defendant may sever his justification where the alleged libel is divisible, we have now to see what application should be made of that principle to this case. Now I have stated what the pleader has here tried to do. He admits that the defendant has gone too far, but he does not mention in what respect, or to what extent he has gone too far. Indeed it is said on his behalf that it is impossible to make the pleading more explicit in this respect. In my opinion this defence is extremely embarrassing to the plaintiff, apart from the rule; but I think also that it infringes Order XXII., r. 1. I do not say that you cannot deal severally with the charges where they are divisible. But I say that the rule was pointed at this very kind of plea. The defendant will not particularise; in effect, therefore, he does not justify. In my opinion Pollock, B., was quite right; therefore, unless the defendant amends his pleading this defence must be struck out. I wish to add that I have not dealt with Order XXXVI., r. 37, because it relates to the trial of the action, and has nothing to do with this stage of the proceedings.

HAWKINS, J. I entirely agree. Order XXXVI., r. 37, applies, it is quite clear, to proceedings at the trial. By Order XXX., r. 1, of the Rules of 1875, according to the decision in *Hawkesley* v. *Bradshaw* (1), it was competent for a defendant even in an action of libel to deny liability and at the same time to pay money into court. To meet that obvious inconvenience Order XXII., r. 1, of the present rules was made. [The learned judge read the rule:—] That gives liberty to a defendant in an action for a debt or damages, except in actions for libel or slander, to pay money into court with a denial of liability; but in libel and slander payment of money into court with a denial of liability was stopped by this rule. It seems to me that this defence is a direct violation of the rule. I have looked through the statement of claim and the defence and I cannot find to what the defence applies, if not to the whole subject-matter of complaint. For if the facts alleged in the defence do not in point of fact justify the alleged libel, I cannot see what they do justify. I find certainly two or three statements in the defence which purport to disclaim any

(1) 5 Q. B. D. 302.

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Hawkins, J.

intention to justify certain facts. Thus in paragraph 5 of the defence, which deals with the charge that the plaintiff had caused operations on horses to be performed, the defendant goes on to say that he does not allege that the plaintiff knowingly or wilfully caused a breach of the provisions of the Cruelty to Animals Act, 1876. But the statement of claim contains no such allegation or innuendo. The same observation applies to paragraph 7, where the defendant says that he does not allege that the plaintiff knowingly or wilfully sacrificed horses which were the property of the government; there is no such innuendo in the statement of claim. It seems to me that the defence really goes to the whole cause of action. It amounts to this; that the defendant says, I justify the whole cause of action if my facts justify it, if they do not then as to the balance I pay money into court. That is precisely what is not allowed by the rule.

But there is another ground upon which also I think that the defence is bad; it is embarrassing. Mr. Finlay cannot point out the portion of the statement of claim in respect of which the payment into court is made. Where payment into court with a denial of liability is allowed, there must be a specific statement as to the part of the cause of action in respect of which the payment is made. This defence therefore comes within Order XIX. r. 27, which relates to embarrassing pleadings. It is calculated to embarrass the plaintiff in ascertaining what is the case which he has to meet, and it must therefore be struck out as embarrassing unless it is amended.

Appeal dismissed.

Solicitor for plaintiff: *Hugh C. Godfray.*
Solicitor for defendant: *John W. Sykes.*

P. B. H

[IN THE COURT OF APPEAL.]

1889
May 17.

FRY *v.* MOORE.

Practice—Substituted Service of Writ—Defendant out of Jurisdiction—Irregularity in Procedure—Waiver—Rules of Supreme Court, 1883, *Order* II., *rr.* 4, 5; *Order* XI.; *Order* LXX., *rr.* 1, 2.

A writ was issued in the general form, without the leave of the Court, against a person who at the date of the writ was out of the jurisdiction. The plaintiff obtained an order for substituted service of the writ within the jurisdiction, and, having served the writ in accordance with the order, signed judgment against the defendant for default of appearance. The defendant took out a summons asking that the judgment might be set aside, and that the plaintiff might be ordered to deliver a statement of claim:—

Held, that the order for substituted service was not void, but that it was only an irregularity which could be waived, and that by taking out the summons for the plaintiff to deliver a statement of claim the defendant had waived the irregularity, and was not entitled to have the judgment set aside.

APPEAL against the refusal by a Divisional Court (Field and Cave, JJ.) of a motion by the defendant for an order that the service of the writ, and all subsequent proceedings in the action, might be set aside, on the ground that at the date of the issuing of the writ the defendant was not within the jurisdiction of the Court.

It appeared that the writ was issued on November 23, 1888, for a cause of action within the jurisdiction. It was in the general form of a writ for service on a defendant within the jurisdiction, and was addressed to the defendant as of Woodbridge, in Suffolk, where he had formerly resided. He was in fact then in Canada. The leave of the Court for the issue of the writ was not obtained.

On January 3, 1889, the plaintiff obtained an order for substituted service of the writ on the defendant's brother, a solicitor, in London, and the writ was served on the brother under this order.

On January 12 judgment was signed against the defendant in default of appearance.

On January 28 a summons was taken out on behalf of the defendant, at the instance of his brother, asking that the judgment might be set aside with costs, and that the plaintiff might be ordered, within ten days, to deliver a statement of claim.

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On March 2 another summons was issued on behalf of the defendant, by a solicitor whom he had retained by telegram to act for him, asking that the judgment might be set aside, and that the plaintiff might be ordered, within ten days, to deliver a statement of claim.

W. S. Robson, for the defendant. When a defendant is out of the jurisdiction, at any rate unless he is deliberately attempting to treat the Court with contempt, a writ ought not to be issued against him without leave. An order for substituted service can only be had in cases in which (if there were no difficulties in the way) personal service could be effected: *Sloman* v. *Government of New Zealand* (1); *Hillyard* v. *Smyth* (2); *Field* v. *Bennett* (3); *Société Industrielle, &c.* v. *Companhia Portugueza, &c.* (4) Rule 4 of Order II. provides that a writ for service out of the jurisdiction shall not be issued without the leave of the Court or a judge. This cannot be evaded by means of an order for substituted service.

Macaskie, for the plaintiff. There was nothing irregular in the issue of the writ. Rule 4 of Order II. says that a writ *for service* out of the jurisdiction cannot be issued without leave; it does not say that, when a defendant happens to be out of the jurisdiction, an ordinary writ cannot be issued without leave. The Court came to the conclusion that the defendant had gone away to avoid process. *Field* v. *Bennett* (3) turned upon Order XI., and the ground of the decision was, that the action was not within Order XI. Here, the writ was regularly issued, and the only objection is to the mode in which it has been served.

At any rate, there has been nothing more than an irregularity; the service is not a nullity. The irregularity is capable of being waived, and by his conduct the defendant has waived it. He has issued two summonses to set aside the judgment on its merits, and has asked that the plaintiff may deliver a statement of claim. That is inconsistent with the notion that the proceedings are a nullity. Any recognition of the proceedings will operate

(1) 1 C. P. D. 563, 567.
(2) 36 W. R. 7.
(3) 56 L. J. (Q.B.) 89.
(4) Weekly Notes (1889), 32.

as a waiver of an irregularity: *Boyle* v. *Sacker* (1); *Mulkern* v. *Doerks* (2); *Derbon* v. *Collis* (3); *Watt* v. *Barnett.* (4) And rule 2 of Order LXX. expressly provides that "no application to set aside any proceeding for irregularity shall be allowed . . . . if the party applying has taken any fresh step after knowledge of the irregularity."

Robson, in reply. The defendant's brother was not his agent to conduct litigation on his behalf, and he certainly had no authority to waive an irregularity. But there could not be any waiver, for the substituted service was a nullity, and everything that followed was equally a nullity. There could not be waiver without knowledge, and there is no evidence that the defendant's solicitor knew that the writ had been issued without leave. (5)

LINDLEY, L.J. I am of opinion that this appeal must be dismissed. On the 23rd of November, 1888, the writ in the action was issued in the ordinary form applicable to a defendant who is within the jurisdiction. The defendant was in fact then out of the jurisdiction, and a writ for service on him there could not even be issued without the leave of the Court. In the form in which it was issued it cannot be said that the writ was irregular, because the plaintiff might have kept it with the view of serving it on the defendant if he should come within the jurisdiction. The writ cannot, therefore, be set aside for irregularity. But then the plaintiff obtained an order for substituted service on the defendant's brother, who had been acting for him in some matters, and the writ was served on the brother. Was this right or wrong? Looking at the various rules relating to service out of the jurisdiction, I do not think this precise case has been provided for. But there are certain principles which govern the rules, and in *Field* v. *Bennett* (6) the Queen's Bench Division laid down the principle, that, if a writ could not be served personally at the

(1) 39 Ch. D. 249.
(2) 51 L. T. (N.S.) 429.
(3) 36 W. R. 667.
(4) 3 Q. B. D. 363.
(5) Lord Coleridge, C.J., was present during the greater part of the argument, but he left the Court before the argument was concluded.
(6) 56 L. J. (Q.B.) 89.

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time when it is issued, there cannot be substituted service. That is a sound principle. You cannot affect a principal through an agent when you could not affect the principal himself. If in such a case an order for substituted service could be made, the process might very easily be abused. Nothing could be easier than to issue an ordinary writ against a foreigner who was residing out of the jurisdiction, and then to obtain an order for substituted service, and thus the very mischief at which the rules relating to service out of the jurisdiction are directed would be brought back. Both principle and authority are against such a practice. I think, therefore, that the order for substituted service of the writ was a bad order.

But then arises the question, whether the order for substituted service was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity. If it was the latter, it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived. Has then the defendant waived the irregularity? He has since taken at least two steps in the action which could only be proper steps on the theory that the order for substituted service was a proper order. In the first place, the defendant took out the summons of the 28th of January, by which he asked that the judgment might be set aside, and that the plaintiff might be ordered to deliver a statement of claim. It is said that the defendant's brother, who then instructed a solicitor to act for him, did not know the facts, and had no authority to do what he did. In my opinion, the brother did know the facts, and, if he had no authority, the want of authority was cured by what took place afterwards. Then on the 2nd of March another summons was taken out, after the defendant had been communicated with, and a solicitor had been properly retained to act for him, for the same purpose as

the first summons. By this summons, again, the action was treated as a properly constituted action, the object being to enable the defendant to raise a defence on the merits. These two steps, as it appears to me, are so inconsistent with the notion that no action was in existence as to amount to a waiver of the irregularity in the procedure. The result, therefore, is that the writ was rightly issued, though the order for substituted service was irregular. The irregularity has, however, been waived by the defendant, and the judgment must stand. The appeal must be dismissed.

LOPES, L.J. *Field* v. *Bennett* (1) and *Hillyard* v. *Smyth* (2) appear to me to establish clearly that there cannot be substituted service of a suit which could not at the time when it was issued be served personally. In the present case the writ could not be personally served because no leave had been obtained to issue it, as rule 4 of Order II. requires, when the defendant is out of the jurisdiction. Therefore, the order for subtituted service was irregular. If we were to hold that service effected in this way was regular we should render all the rules relating to service out of the jurisdiction absolutely useless. If a defendant was out of the jurisdiction the plaintiff would only have to obtain an order for substituted service of an ordinary writ, and then every other step in the action could proceed in the ordinary way. Then comes the question, has the irregularity been waived by the defendant? It is said that the proceeding was a nullity, and no doubt the distinction between a nullity and a mere irregularity in procedure is often a very nice one. But in the present case I think there was only an irregularity. The proceeding—the issue of the writ—was a proper one; the irregularity was only in the mode in which it was attempted to carry it out by service. I think this was a mere irregularity in procedure which could be waived by the defendant. It appears that, before the summons of March 2 was issued, the defendant had retained a solicitor to act for him, and by that summons he asked, not only that the judgment might be set aside, but that the plaintiff might be ordered to deliver a statement of claim. This was utterly incon-

(1) 56 L. J. (Q.B.) 89. (2) 36 W. R. 7.

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sistent with the theory that, by reason of the non-service of the writ, no action was in existence. I think it amounts to a waiver of the irregularity, and that the judgment must stand.

Appeal dismissed.

Solicitor for defendant: *A. W. Mills.*
Solicitor for plaintiff: *J. Greenfield.*

W. L. C.

May 28, 31; July 6.

[IN THE COURT OF APPEAL.]

ALLBUTT *v.* THE GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION.

Medical Practitioner—General Council of Medical Education—Jurisdiction—Removal of Name from Register—Power of Court to review Decision—Mandamus—Libel—Privilege—Publication of Minutes of General Council—Medical Act (21 & 22 *Vict.* c. 90), s. 29.

By the Medical Act (21 & 22 Vict. c. 90), the General Council of Medical Education and Registration were established, one of their duties being to keep a register of medical practitioners.

By s. 29, "if any registered medical practitioner shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register":—

Held, that if the council, acting bonâ fide and after due inquiry, have adjudged a medical practitioner to have been guilty of infamous conduct in a professional respect, the Court has no jurisdiction to review their decision.

Ex parte La Mert (4 B. & S. 582; 33 L. J. Q. B. 69) approved and followed.

Held, also, that the publication of the minutes of the council, containing a report of their proceedings, comprising a statement that the name of a specified medical practitioner has been removed from the register on the ground that, in the opinion of the council, he has been guilty of infamous conduct in a professional respect, is, if the report be accurate, and published bonâ fide and without malice, privileged, and the medical practitioner cannot maintain an action of libel against the council in respect of the publication.

APPEAL by the plaintiff against the judgment of Pollock, B., at the trial of the action.

The plaintiff, Henry Arthur Allbutt, was a medical practitioner, who had been registered as such under the provisions of the Medical Act, 1858 (21 & 22 Vict. c. 90). The defendants were the General Council of Medical Education and Registration of the United Kingdom (constituted under that Act), and W. J. C. Miller, their registrar.

By his statement of claim the plaintiff alleged that the defendants had wrongfully erased his name from the register of medical practitioners, and that they had published proceedings and a resolution of the council containing defamatory matters respecting him. The plaintiff claimed a mandamus commanding the defendants to restore his name to the register, damages for the removal of his name; damages for the alleged libel, and an injunction to restrain the defendants from publishing it. The statement of defence alleged that the defendant's name had been erased after due inquiry; and, with regard to the alleged libel, that the words complained of were true in substance and in fact, and that the defendants published the words bonâ fide and without malice to the plaintiff, and under circumstances which made them privileged.

GENERAL SECRETARIAT LIBRARY

At the trial before Pollock, B., it appeared that the defendants, assuming to act under s. 29 of 21 & 22 Vict. c. 90, directed their registrar to erase the name of the plaintiff from the register, and that his name was accordingly erased. Before erasing the plaintiff's name the council held an inquiry into certain charges made against him, and upon that inquiry the plaintiff was represented by counsel. At the conclusion of the inquiry the council passed the following resolution: "That in the opinion of the council Mr. Henry Allbutt (the plaintiff) has committed the offence charged against him, that is to say, of having published and publicly caused to be sold a work entitled 'The Wife's Handbook' in London and elsewhere, and at so low a price as to bring the work within reach of the youth of both sexes to the detriment of public morals. That the offence is, in the opinion of the council, infamous conduct in a professional respect."

The book in question contained a series of directions to women as to the management of their health, particularly with reference to pregnancy and childbearing, and as to the management of infants and young children. One chapter in the book was entitled "How to prevent conception when advised by the doctor," and it contained descriptions of various methods and appliances which might be employed for that purpose. At the end of this chapter was the following foot-note: "This chapter is not intended for reproduction without the author's permission. Like

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the rest of The Wife's Handbook, it is copyright. It is intended to be read in the privacy of the chamber by married women or by those contemplating marriage, and is not intended for the publicity of the streets, or to satisfy the curiosity of the vicious." The charge against the plaintiff was founded upon the publication of this chapter. The book was sold by non-professional booksellers, and could be purchased by anyone at the price of sixpence.

The defendants published a book containing the minutes of the proceedings of the council, and in this book was contained a statement of the fact that the plaintiff's name had been erased from the register; a report of the proceedings before the council in relation to the charge against the plaintiff; and a copy of the above stated resolution.

No evidence was adduced to shew that the defendants had acted malâ fide in the inquiry. The learned judge held that the council had the sole jurisdiction under the Act to deal with the matter, and that the Court had no power to review their decision, and also held that the publication by the defendants was privileged.

The plaintiff appealed.

May 28, 31. *Jelf, Q.C.*, and *Macaskie*, for the plaintiff. The General Medical Council had no jurisdiction to strike the plaintiff off the register under 21 & 22 Vict. c. 90, s. 29 (1), the enactment under which they purported to act. There must be evidence of "infamous conduct in a professional respect" to give them jurisdiction under the Act. There was no evidence in this case of anything that could fairly be called "infamous" conduct; and, assuming that there was such conduct, it was not in a professional respect. The subject treated of by the plaintiff in the part of his book which was complained of has relation to a serious problem, which has frequently exercised human thought, and

(1) Sect. 29: "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

has been made the subject of discussion from time to time by public writers, and, though one may disagree with and disapprove of the opinions of the plaintiff, the expression of such opinions cannot be called either infamous conduct, or infamous conduct in a professional respect. A professional man may entertain opinions on a problem of the day which the majority of people think erroneous; but, if he publishes a book expressing such opinions, he can hardly be said to be doing so in his professional capacity, even although the subject is one cognate to his profession, and one of which he has professional knowledge.

Secondly, the publication by the defendants of the passages which they published in this report with regard to the plaintiff is not privileged.

[LOPES, L.J. Does it not follow, if the defendants have power to strike the plaintiff off the register, that they must be allowed to give notice that they have struck him off?]

Even if that were so, there can be no privilege for the publication of the circumstances under which he was struck off in a book which is sold over the counter to any purchaser: *Oliver* v. *Bentinck.* (1) The General Medical Council is not a Court within the doctrine which gives privilege to fair reports of the proceedings of a Court of Justice: *Charlton* v. *Watton.* (2)

Sir R. E. Webster, A.G., Kennedy, Q.C., and *Muir Mackenzie,* for the defendants. It is clear that the Medical Council had jurisdiction under the statute to inquire whether the plaintiff had been guilty of infamous conduct in a professional respect, and this Court has no jurisdiction to review their decision on the question. The intention of the Act was to institute a skilled professional tribunal to decide on matters of professional conduct. That being so, if it was a reasonable view that the matters complained of had relation to professional conduct, the Medical Council had jurisdiction, and this Court cannot review their decision: *Ex parte La Mert.* (3)

[THE COURT intimated that they were of opinion that the decision in *Ex parte La Mert* (3) governed the case, and that they were not prepared to overrule it.]

(1) 3 Taunt. 456. (2) 6 C. & P. 385.
(3) 4 B. & S. 582; 33 L. J. Q. B. 69.

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So far as the alleged libel is concerned, there is no suggestion of any want of bona fides, or of express malice. That being so, the publication is privileged. In *Purcell* v. *Sowler* (1) a distinction is drawn between the publication of reports of interim proceedings at meetings of public bodies at which ex parte charges of misconduct are made, and the publication of the record of proceedings before a public body, invested with judicial powers, which have terminated. In the former case the publication would not be privileged; in the latter it would. The publication complained of here is a true and bonâ fide report of facts; it is not a report of anything ex parte, and it is privileged. The principle of the decision in *Stockdale* v. *Hansard* (2) was, that no privilege attached to the publication of proceedings of parliament. In *Cooper* v. *Lawson* (3) the publication would have been held privileged, if there had been no comment. The publication related to proceedings before examiners of the sufficiency of sureties for election petitions, appointed under the Act 9 Geo. 4, c. 22, s. 7. There was nothing to shew that the examiners were in any sense a public Court. The minutes of the Medical Council ought to be a truthful record of their proceedings; if they strike a man's name off the register they ought to record their reasons for doing so. It has been said that they might, perhaps, be entitled to give that information to members of the medical profession, but that they had no right to publish it to the public generally. But they have a duty towards the public, and, if they publish their minutes honestly, without malice and without comment, the publication is privileged, because it is for the benefit of the public. In *Purcell* v. *Sowler* (1) the judgment of Mellish, L.J., shews that such a publication as the present is privileged.

[LORD COLERIDGE, C.J. If the point was decided then, what was the object of the Newspaper Libel Act of 1881?]

The object was to extend the privilege to the publication of proceedings in which there was nothing of a quasi judicial nature. In the present case the proceedings are those of a quasi judicial tribunal created by statute; in such a case there is privilege.

(1) 2 C. P. D. 215. (2) 9 Ad. & E. 1.
(3) 8 Ad. & E. 746.

It is a duty which the council owe to the public to publish the result of such proceedings. If the report were untrue, the case should be left to the jury, but, if it is true, as it is admitted to be in the present case, the publication is privileged.

[LORD COLERIDGE, C.J. The plaintiff denies that he has been guilty of an infamous offence; it is only true that the council has adjudged him guilty of it. Ought it not to be decided by a jury whether he has been guilty in fact?]

The principle of the cases as to the repetition of a libel has never been extended to the proceedings of a quasi judicial body: Odgers on Libel, 2nd ed. p. 176, and cases there collected. The argument is, that the defendants were bound to record their decision on their minutes, and to publish them, and that, if there is no mala fides, the publication is absolutely privileged. The principle of the privilege attached to the publication of judicial proceedings is, that the public have an interest in knowing them: *Henwood* v. *Harrison.* (1) In that case, Willes, J., said (at p. 622): "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

[LOPES, L.J. No case lays down the principle better than *Harrison* v. *Bush.* (2)]

Usill v. *Hales* (3) is another illustration of the principle. If public interest is the test of privilege, the statement ought to be truthful. It is the duty of the council to state the grounds on which they have struck a man's name off the register. If they do not publish their proceedings, they will be open to the objection that they are acting as a secret tribunal in a matter which the legislature has considered to be one of public interest: *Barrows* v. *Bell* (4); *Cox* v. *Feeney* (5); *Fleming* v. *Newton* (6); *Williams* v. *Smith.* (7) The judgment of Mansfield, C.J., in *Oliver* v. *Bentinck* (8) is really in the defendants' favour.

(1) Law Rep. 7 C. P. 606.
(2) 5 E. & B. 344.
(3) 3 C. P. D. 319.
(4) 7 Gray (Massachusetts), 301.
(5) 4 F. & F. 13.
(6) 1 H. L. C. 363.
(7) 22 Q. B. D. 134.
(8) 3 Taunt. 456.

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Jelf, Q.C., in reply. As to the jurisdiction of the Court to review the decision of the council, in *Ex parte La Mert* (1) the offence alleged was the publishing of an unprofessional treatise. In the present case the charge was the publication of a book at so low a price as to be detrimental to morality. The council have nothing to do with morality; they are only concerned with professional conduct. The grounds of the conviction differed from those of the charge.

That a corporation is liable for a libel is shewn by *Abrath* v. *North Eastern Ry. Co.* (2) To say of a medical man that he has been guilty of infamous conduct in a professional respect is clearly libellous, unless the publication is privileged. The question is, how far the privilege of the defendants extends. They may be entitled to make the statement to members of the council, or possibly to any member of the medical profession, but they are not entitled to make it to the public generally. If the defendants are outside the privilege, it is not necessary for the plaintiff to prove express malice. The defendants had no right to publish the grounds of their decision to remove the plaintiff's name from the register. It is by no means clear that it is for the benefit of the public that the grounds of the decision should be published. The object of the Act is that the public should have a correct copy of the register, but the council have no right to do more than state the negative fact that the name of a man whom they have decided to remove is no longer upon the register. It is not essential that the public should know what took place before the tribunal. A newspaper reporter would not have been entitled to publish the proceedings. They did not take place in a public court, and the council stand in no better position than a newspaper reporter. The defendants can only rely upon dicta in the judgments in *Purcell* v. *Sowler* (3), and *Cooper* v. *Lawson.* (4) In both those cases the decision was in favour of the plaintiff. The American case cited is not binding on this Court.

Cur. adv. vult.

(1) 4 B. & S. 582; 33 L. J. (Q. B.) 69.
(2) 11 App. Cas. 247, 253. (3) 2 C. P. D. 215.
(4) 8 A. & E. 746.

889. July 6. LOPES, L.J., delivered the judgment of the Court (Lord Coleridge, C.J., and Lindley and Lopes, L.JJ.) as follows:

The plaintiff complains that the defendants (the General Council of Medical Education and Registration of the United Kingdom) have wrongfully and unlawfully erased his name from the medical register, and asks for a mandamus commanding the defendants to restore his name to the register. The plaintiff also complains that the defendants have libelled him, by printing and publishing of him in a book, entitled Minutes of the General Council, that his name had been erased from the Medical Registry, page 317, and that in the opinion of the council the plaintiff had committed the offence charged against him—that is to say, of having published and publicly caused to be sold a work entitled 'The Wife's Handbook,' in London and elsewhere, and at so low a price as to bring the work within the reach of both sexes, to the detriment of public morals, and that the offence was, in the opinion of the council, infamous conduct in a professional respect. With regard to the erasure of the plaintiff's name, the plaintiff says that the defendants acted without jurisdiction, that there was no evidence of any infamous conduct in a professional respect, and, therefore, nothing upon which to found their jurisdiction. The defendants say, on the other hand, that they lawfully, and in the exercise of a jurisdiction conferred upon them by the Act of Parliament, struck the plaintiff's name off the register, and that, as there was jurisdiction to enter upon this inquiry, they (the Medical Council) are the sole judges of what was done during the inquiry which they had jurisdiction to initiate. The learned judge thought that there was no evidence of any of the complaints which he ought to leave to the jury, and gave judgment for the defendants.

The section upon which the council have acted in erasing the plaintiff's name is the 29th section of 21 & 22 Vict. c. 90, which says: "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if

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they see fit, direct the registrar to erase the name of such medical practitioner from the register." Having regard to the nature of the complaint, the council clearly had jurisdiction to enter upon the inquiry, and, having that jurisdiction, are constituted by the legislature the sole judges whether that complaint was substantiated. To use the words of Cockburn, C.J., in *Ex parte La Mert* (1), "This Court has no more power to review their decision than they would have, in the present mode of proceeding, of determining whether the facts had justified a conviction for felony or misdemeanour under the first branch of the section." It is said by the plaintiff that there was no "due inquiry," and that that question ought to have been left to the jury. We think that there was no evidence of any absence of a due inquiry which ought to have been left to the jury. All charges of mala fides were withdrawn, and it was admitted that the council acted honestly, and without any improper feeling or motive towards the plaintiff. We can find nothing irregular in the proceedings of the council; the plaintiff had every opportunity afforded to him of bringing his case before the council, who heard his counsel and his evidence, and adjudicated thereon.

With regard to the alleged libel, questions of greater difficulty arise, and questions of grave importance. The defence of the council is, that they published what is complained of bonâ fide, and without malice, and in circumstances which constituted the same privileged. The libel complained of is published in a book containing the minutes of the General Medical Council, and is part of the report of the proceedings of the council in the plaintiff's case. It is most material to bear in mind that it is admitted that the report is truthful, accurate, and honest, published bonâ fide, without malice, not an ex parte report, but a report of facts which have been finally ascertained and adjudicated upon. To determine whether such a report is privileged, it is important to consider the position, powers, and duties of the Medical Council. The council are not a private association. They are a public corporation, invested with large powers and privileges and charged with important duties—duties in which not only the profession, but the public at large, are interested. They are authorized to

(1) 33 L. J. (Q. B.), at p. 70.

hold quasi-judicial inquiries, inquiries involving the status and character of professional persons, members of their body, involving the rights of those persons towards the public and the rights of the public towards them. There is no appeal from their decision, and the influence of public opinion is no small safeguard against the abuse of the powers intrusted to them. This influence cannot be exercised if they keep secret the grounds on which they act. The public are clearly interested in knowing these grounds. The preamble of the Act states, that it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners. The council, by s. 10, have power to appoint registrars, who are to keep correct registers, and in every year to cause to be printed, published, and sold a correct register, a copy of which is made evidence in all courts. Sects. 28 and 29 give the council power to erase names from the register. Sects. 31 and 32 deal with the privileges of registered persons, enabling those who are registered to sue, and disentitling those who are not registered from suing, for their charges. By s. 34 a "legally-qualified medical practitioner" is to be construed to mean a person registered under the Act. Sect. 35 exempts registered persons from serving on juries. By s. 36 unregistered persons are disqualified from holding a large number of appointments. Sect. 37 declares that no certificate required from any medical practitioner shall be valid, if the person signing it is not registered. These provisions shew how important it is that, not only the profession, but the public should have accurate information as to the proceedings of the council, should know who is on the register, who is entitled to sue for charges, who is exempted from serving on juries, who is entitled to hold those public appointments for which medical men are eligible, and who can sign valid certificates. Again, it is important that, if a person's name is erased, accurate information should be given to the public of the cause of its erasure. The medical man whose name is erased is not disqualified from practising, and old patients, and other medical men invited to meet him in consultation, might reasonably desire to know the nature of the offence in respect of which the erasure was made, in order to determine whether they would still continue to employ or meet him. This they could not learn from the register

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itself, but could learn from the proceedings of the council as appearing in the book containing the report complained of. We are of opinion that the Medical Council would in many cases fail in discharging their social and moral duties to the public if they shrank from the responsibility of making known to the public the grounds on which they had removed a man's name from the register, and thereby converted him from a qualified into an unqualified practitioner. Can it be said that a fair, honest, and accurate report of such proceedings is not privileged? If this had been an impartial and accurate report of a proceeding in a public Court of Law it would have been beyond all doubt privileged. The reason of this privilege is thus stated by Lawrence, J., in *Rex* v. *Wright* (1): "The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." Cockburn, C.J., uses language almost identical in *Wason* v. *Walter* (2), and Willes, J., in *Henwood* v. *Harrison* (3) says: "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals." It seems to us, having regard to the nature of the tribunal, the character of the report, the interests of the public in the proceedings of the council, and the duty of the council towards the public, that this report stands on principle in the same position as a judicial report. It would be stating the rule too broadly, in our opinion, if it was held, that, to justify the publication of proceedings such as these, the proceedings must be directly judicial, or had in a court of justice. We can find the law nowhere so broadly stated, nor do we think that in these days it would be so laid down. The Court must adapt the law to the necessary condition of society, and must from time to time apply, as best it can, what it thinks is the good sense of rules which exist to cases which have not been positively decided to come within them. We have said that we can find no direct

(1) 8 T. R., at p. 298. (2) Law Rep. 4 Q. B. 87.
(3) Law Rep. 7 C. P. 666, at p. 622.

authority against holding this publication privileged. We do find, however, authorities which, in our opinion, favour the contention of the defendants, that the rule of privilege extends to proceedings such as these. *Purcell* v. *Sowler* (1) was a case decided by the Appeal Court in 1877. It was there held that the administration of the poor law, both by the government department and by the local authorities, including the conduct of the medical officers, is a matter of public interest, but that the publication of a report of proceedings at a meeting of poor law guardians, at which ex parte charges of misconduct against the medical officer of the union were made, is not privileged by the occasion. The proceedings in that case were before a board of guardians, and were clearly not judicial. They were, however, ex parte, and on that ground only were held not privileged. Cockburn, C.J., after stating that proceedings in courts of law and proceedings in parliament are privileged, although statements may have been made prejudicially affecting the character of private individuals, proceeds thus (p. 219):—"Many intermediate cases may be put. Take the meetings of the corporation of the city of London—the discussion at such meetings might involve strong observations on the conduct of particular individuals; so also as to the municipal councils of other cities or boroughs; so again as to the meetings of magistrates in quarter sessions, not as courts of justice, but for transacting the business of their county. In all these cases I should be sorry to lay down as law that the proceedings of such meetings may not be fully reported, although the character of private individuals may be incidentally attacked. But it is unnecessary, for the decision of the present case, to lay down any such rule; and I wish to be understood as by no means saying that the proceedings of different bodies to whom part of the administration of the public business of the country is committed would not be matter of general discussion and publication."

In the same case Mellish, L.J. (p. 221), says:—"I do not mean to say that the matter was not of such public interest as that comments would not be privileged if the facts had been ascertained." And Bramwell, L.J. (p. 222), says:—"If this had been a discussion on the plaintiff's conduct, the facts not being in

(1) 2 C. P. D. 215.

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Lopes, L.J.

controversy, the matter was a subject of such general public interest as would have given a right to comment upon it; and fair and bonâ fide comments would have been justified." This case, in our view, goes far to shew that proceedings such as these, where the facts are ascertained and finally adjudicated upon, are privileged. *Cox* v. *Feeney* (1), decided in 1863, was a nisi prius decision, and Cockburn, C.J., spoke with approval of the dictum of Lord Tenterden, C.J., viz., that "a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know;" and told the jury that the publication of a matter of a public nature, and of public interest, and for public information, was privileged, provided it was published with the honest desire to afford the public information, and with no sinister motive. The present case is stronger. The report is a report of proceedings which actually took place, proceedings within the jurisdiction of the council, a report of proceedings where the facts had been ascertained, a bonâ fide true report without any sinister motive, a report of a matter of a public nature, a report of proceedings in which the public are interested, and in respect of which they are entitled to information. New and important bodies are from time to time constituted by the legislature, such, for instance, as the London County Council, and other county councils throughout the country, bodies to whom the most important duties are intrusted, duties in which the community at large are interested. Is it to be said that a bonâ fide, honest and accurate report of the proceedings of these bodies is not privileged, because in the course of the proceedings the character or conduct of individuals is impugned? Such a result would be most mischievous; it would impede the free action of these bodies, and deprive the public of information to which, in our opinion, they are entitled. If the report had simply been a report of the fact that the plaintiff's name had been erased, we cannot think it would have been contended that the report was not privileged. It is said that, because the nature of the offence is stated, the privilege is lost. In our opinion the council were fully justified in stating the cause of the erasure. If it had not been stated, the plaintiff might have complained that the public were left to infer that he had been convicted of felony or

(1) 4 F. & F. 13.

misdemeanour under the earlier part of s. 29. It might have been said that it was unfair to publish part of the proceedings only. Again, if they have published too much, this would not destroy the privilege; it might be evidence of express malice, but it is admitted there was no such malice. It is also said that the privilege is lost because there has been a publication to the public at large, to a class beyond those interested in the matter; but this we have disposed of, because, in our opinion, the public at large were interested in these proceedings, and their publication was information to which the public were entitled. There is an American decision (*Barrows* v. *Bell* (1)) very similar to the present case, where it was held, that the publication by a member of the Massachusetts Medical Society of a true account of the proceedings of that society in the expulsion of another member, for a cause within its jurisdiction, was privileged. The decision is instructive, and is entirely in accordance with the views which we have expressed. In *Whiteley* v. *Adams* (2) Erle, C.J., said (at p. 418): "Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification; but all are clear that it is a question for the judge to decide." This action is, in truth, an attempt to have the decision of the council reviewed by another tribunal. We express no opinion on that decision. It cannot be reviewed directly, and this attempt to review it indirectly cannot succeed. We have come to the conclusion that the publication of these proceedings, being true, accurate, and bonâ fide, is privileged, and that the learned judge was right in holding that there was no question which he ought to leave to the jury, and in giving judgment for the defendants. The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for plaintiff: *Harper & Battcock.*

Solicitors for defendants: *Warren, Gardner & Murton.*

(1) 7 Gray (Massachusetts), 301. (2) 15 C. B. (N.S.) 392.

W. L. C.

1888
Nov. 17, 20.
1889
June 1.

THE QUEEN *v.* THE BISHOP OF LONDON.

Ecclesiastical Law—Bishop—Decorations forbidden by Law—Representation of Illegality by Inhabitants of Diocese—Discretion of Bishop to stop Proceedings—Mandamus—Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *ss.* 8, 9.

By s. 9 of the Public Worship Regulation Act, 1874, where a representation, under s. 8, has been sent to the bishop of the diocese complaining of unlawful alterations in or additions to the fabric or ornaments of a cathedral church, he shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the Act, "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state his reasons in writing."

A representation was sent to the Bishop of London complaining that the dean and chapter of St. Paul's Cathedral Church had set up on a reredos in that church a figure, five feet in height, of our Lord upon the cross, in a conspicuous position immediately above the communion table, and a figure, 5 ft. 6 in. in height, of the Virgin with the Child in her arms, in a conspicuous position above the figure of our Lord, and that each of those figures tended to encourage ideas and devotions of an unauthorized kind, and were unlawful.

The bishop replied that, having in pursuance of the statute considered the whole circumstances of the case, he was of opinion that proceedings should not be taken; stating, in substance, as his reasons, that the main question of principle at issue had already been decided in *Phillpotts* v. *Boyd* (Law Rep. 6 P. C. 435), in which a reredos, shewing a figure of our Lord in the act of ascending into Heaven, in a conspicuous position immediately above the communion table, was held to be lawful; that it appeared impossible to say that the difference between the two erections was of very grave importance, or that one offered serious temptations to idolatry and the other did not; that litigation in such matters, even where necessary in order to settle disputed matters of grave importance, was a necessary evil, keeping up irritation and party strife, embittering men's feelings, inflicting much mischief on the Church and on true religion; and only tolerable in order to prevent worse mischief that would otherwise follow; and he was satisfied that, in the present instance, the proceedings could not end in any result which would make up to the Church, and to the religious life of the country, for the mischief which the litigation itself must inflict on them.

On an application by the complainants for a mandamus to compel the bishop to act in furtherance of the proceedings in one of the ways prescribed by the statute:—

Held, by Lord Coleridge, C.J., and Manisty, J. (Pollock, B., dissenting), that the reasons given by the bishop for his decision were not reasons contemplated by the statute, or founded upon a consideration of "the whole circumstances of the case," within the meaning of s. 9; and that, having failed to exercise his

discretion within the statutory limits, the Court could review the bishop's decision, and ought to issue the mandamus.

By Pollock, B. The bishop's reply sufficiently shewed that he had considered "the whole circumstances of the case," and the Court had, therefore, no power to review his discretion, or his reasons for exercising it in a particular way.

RULE, obtained on behalf of four inhabitants of the diocese of London, calling upon the Bishop of London to shew cause why a writ of mandamus should not issue ordering him to transmit a copy of the representation of the applicants, dated May 4, 1888, to the persons complained of, namely, the dean and chapter of the cathedral church of St. Paul, in the city of London, and proceed therein in accordance with the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85); or, in the alternative, ordering the bishop to proceed to consider the whole of the circumstances in the case affecting the said representation without considering any other circumstances, or taking into consideration reasons other than the circumstances of the case.

The applicants, being all persons qualified so to do under the provisions of s. 8 of the Public Worship Regulation Act, 1874 (1),

(1) Sect. 8 provides that if, in the case of cathedral churches, any three inhabitants of the diocese, being male persons of full age, who have signed and transmitted to the bishop under their hands the declaration contained in Schedule A under this Act, and who have, and for one year next before taking any proceeding under the Act have had, their usual place of abode in the diocese within which the cathedral church is situated, shall be of opinion that in such church any alteration in, or addition to, the fabric, ornaments, or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church, such inhabitants may send a representation in the prescribed form duly filled up and signed, accompanied by a statutory declaration as therein mentioned, affirming the truth of the statements contained in the representation.

By s. 9: "Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion . . . and a copy thereof shall forthwith be transmitted to . . . some one of the persons who have made the representation, and to the person complained of), he shall, within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of, and shall require such person, and also the person making the representation, to state in writing within twenty-one days whether they are willing to submit to the directions of the bishop touching the matter of the said representation, without appeal, and if they

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on May 4, 1888, duly made a representation in writing to the bishop, stating:

"1. That the dean and chapter of the cathedral church of St. Paul, in the city of London, within five years before the date hereof, that is to say, in the month of January, 1888, have introduced into the said cathedral church, and set up upon the altar-piece or reredos therein, an image or sculptured subject representing our Lord upon the Cross, in a conspicuous position immediately above the communion table, the figure of our Lord, being of the height of five feet, or thereabouts:

"2. That the said image or sculptured subject is so constructed as to have the appearance of such an altar crucifix as was used in the Church of England immediately before the Reformation, and so as to answer the purposes for which such a crucifix was intended:

"3. That the said dean and chapter, within five years before the date hereof, that is to say, in the month of January, 1888, have introduced into the said cathedral church, and set up upon the said altar-piece or reredos therein, an image or sculptured subject representing the Blessed Virgin Mary, with the Child in her arms, in a conspicuous position a few feet above the first herein mentioned image or sculptured subject, the figure of the Blessed Virgin being of the height of 5 ft. 6 in., or thereabouts:

"4. That each of the said images or sculptured subjects tends to encourage ideas and devotions of an unauthorized and superstitious kind, and is unlawful:

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shall state their willingness to submit to the directions of the bishop without appeal, the bishop shall forthwith proceed to hear the matter of the representation in such manner as he shall think fit, and shall pronounce such judgment and issue such monition (if any) as he may think proper, and no appeal shall lie from such judgment or monition: . . . provided that no judgment so pronounced by the bishop shall be considered as finally deciding any question of law, so that it may not be again raised by other parties. . . . . If the person making the representation, and the person complained of shall not within the time aforesaid state their willingness to submit to the directions of the bishop, the bishop shall forthwith transmit the representation to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster."

"5. That the said images or sculptured subjects are respectively additions to the fabric, ornaments, or furniture of the said cathedral church, and are decorations forbidden by law."

On May 23, 1888, the bishop, in pursuance of s. 9, delivered his reply to the representation of the applicants in the following terms:—

"We, Frederick, by divine permission Bishop of London, having in pursuance of the provisions of the Public Worship Regulation Act considered the whole circumstances attending the above representation, are of opinion that proceedings should not be taken thereon, for the following reasons:—

"The proposed proceedings have for their object the determination of the question whether a reredos shewing our Lord upon the Cross in a conspicuous position immediately above the communion table, and also the Blessed Virgin Mary, with the Child in her arms, in a conspicuous position a few feet above, has any tendency to idolatry, and whether its erection is permitted by law.

"The main question of principle here at issue has been already decided in the *Exeter Case* (*Phillpotts* v. *Boyd* (1)). In that case the reredos shewed a figure of our Lord in the act of ascending to Heaven, in a conspicuous position immediately above the communion table, and this reredos was held to be lawfully erected.

"The sole object of the proceedings now proposed is merely to determine whether there may be exceptions to the principles laid down in the *Exeter Case* (1), and whether the reredos now erected in St. Paul's is such an exception. It appears to me impossible to say that the difference between the two erections is of very grave importance, or that one offers serious temptations to idolatry and the other does not.

"Litigation in these matters is sometimes necessary in order to settle disputed points of grave importance. But even in such cases litigation is a necessary evil. It keeps up irritation and party strife; it embitters men's feelings; it inflicts much mischief on the Church and on true religion, and it is only tolerable as a preventive of worse mischief that would otherwise follow.

(1) Law Rep. 6 P. C. 435.

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"It is always possible after any great question of principle has been decided to keep up litigation indefinitely by raising minor points, and such litigation becomes more mischievous the longer it is continued, while the results obtained from it are of exceeding little value.

"I am satisfied that in the present instance the proceedings could not end in any result which would make up to the Church, and to the religious life of the country, for the mischief which must inevitably be inflicted on them by the litigation itself."

The applicants thereupon obtained this rule.

Sir R. E. Webster, A.G. (*Jeune, Q.C.*, and *Lewis Coward*, with him), for the Bishop of London, and *Jeune*, Q.C. (*Lewis Coward*, with him), for the Dean and Chapter of St. Paul's, shewed cause. The bishop's reply to the representation of the applicants shews that he has exercised the discretion given to him by s. 9 of the Public Worship Regulation Act, 1874, and the exercise of that discretion cannot be questioned in this application for a mandamus. The form of his reply is in accordance with the statute; he has considered the question; decided that the proceedings shall not go on, and stated his reasons. Unless it can be shewn clearly that he has so misconstrued the representation as not to have really exercised any discretion at all, his decision cannot be reviewed. The object of the applicants is to determine whether there may not be exceptions to the principles laid down in the *Exeter Case, Phillpotts* v. *Boyd* (1), in which the question was whether a structure of a similar character to that complained of here was idolatrous, or only decorative ornament. The bishop has found as facts that the difference is not of grave importance, and that if the reredos in Exeter Cathedral does not tend to idolatry the reredos at St. Paul's does not. After that finding this case cannot be said to be an exception to the *Exeter Case.* (1) In the *Denbigh Case—Hughes* v. *Edwards* (2)—Lord Penzance held that a sculptured panel representing the figure of Christ on the cross, was within the decision in the *Exeter Case* (1), and granted a faculty permitting its re-erection. The question was substantially the same as in the present case. It depended on the nature of

(1) Law Rep. 6 P. C. 435. (2) 2 P. D. 361.

the structure, as it does here, and the reason of the decision was that it did not appear to the Court probable that the structure would be abused, having regard to its nature and position. Here the bishop has taken the decision in the *Exeter Case* (1) as a statement of the law, and has thus gone through the same mental process as Lord Penzance did in the *Denbigh Case.* (2) On a fair construction of his reply the bishop has clearly taken the circumstances of the case into his consideration and exercised his discretion. By the statute he is bound to come to a decision after considering the whole circumstances of the case. His reply shews that he has considered, as the circumstances of the case, whether the structure in question differs from that in the *Exeter Case* (1), whether it tends to idolatry, or is merely decorative ornament, and he has also considered circumstances which have a bearing on the case, namely, whether litigation in the particular matter would bring about any good result, and what would be the probable effect of it with respect to the interests of the Church in his diocese.

Under the Church Discipline Act (3 & 4 Vict. c. 86) the bishop's discretion in respect to the issue of commissions was complete: *Julius* v. *Bishop of Oxford.* (3) It was not intended to give any less discretion by the Public Worship Regulation Act, 1874. The provision in s. 9 of that Act, that the bishop shall state his reasons in writing, was introduced in order to put upon him the responsibility of dealing with the case in a judicial way, and without delay. Possibly, also, it was in order to ascertain whether he had exercised any discretion at all. But the legislature never intended to give an appeal wherever it was thought that the bishop had come to a wrong conclusion either on the facts or on the law. This Court will not review the decision of a competent tribunal if it appears on the face of the decision that the tribunal has considered the question and exercised its discretion: *Rooke's Case* (4); *Morrell* v. *Martin* (5); *Soady* v. *Wilson* (6); *Reg.* v. *Justices of Middlesex* (7); *Ex parte*

(1) Law Rep. 6 P. C. 435.
(2) 2 P. D. 361.
(3) 5 App. Cas. 214.
(4) 3 Coke, Pt. V., p. 203.
(5) 3 M. & G. 581.
(6) 3 A. & E. 248, judgment of Lord Denman, C.J., at p. 264.
(7) 2 Q. B. D. 516

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Cook, In re Dyson (1). The bishop's discretion under the statute is at least as large as that reposed in a judicial officer.

In cases where authority is given to approve of a particular person for a particular office, the Court will not guide the conscience of the person having the authority to appoint: *Rex* v. *Archbishop of Canterbury* (2); *Rex* v. *Bishop of Gloucester* (3); *Rex* v. *Mayor of London.* (4) The bishop's discretion is analogous to that of a visitor, and is not reviewable either on the facts or the law. If his reasons for declining to forward the representation are founded on a wrong view of the law, his discretion cannot be interfered with so long as he has considered the circumstances of the case, even though he gives but one reason for his decision, though it might, perhaps, be otherwise if he gave a reason so bad as to be no reason at all. In *Westerton* v. *Liddell* (5) the Privy Council held that crosses were not ornaments unauthorized by the Prayer Book of 2 Ed. 6, and that they were not illegal images within the proclamation of Edward VI., and the statute 1 Eliz. c. 2. If the bishop has misconstrued the decision in *Phillpotts* v. *Boyd* (6) he has not the less considered the circumstances of the case. In *Julius* v. *Bishop of Oxford* (7) there was a clear mistake in law, yet the Court of Appeal and House of Lords held that that mistake afforded no ground for interfering with the discretion. But it is further contended that the bishop in the present case has not mistaken the decision in *Phillpotts* v. *Boyd.* (6) He has correctly interpreted that decision, and has decided that the figures complained of here are decorative only and not idolatrous. In *Clifton* v. *Ridsdale* (8) it was proved as part of the circumstances of the case that the clergy were in the habit of lighting up and illuminating the crucifix which was placed on the top of a screen separating the chancel of the church from the nave. It was proved also that they bowed ceremoniously before it; that there were stations of the cross in the church, and that ceremonious acts were done at them. There was no evidence of such circum-

(1) 2 E. & E. 586.
(2) 15 East, 117, judgment of Lord Ellenborough, C.J., at p. 139.
(3) 2 B. & Ad. 158.
(4) 3 B. & Ad. 255.
(5) Moore's Special Report.
(6) Law Rep. 6 P. C. 435.
(7) 5 App. Cas. 214.
(8) 1 P. D. 316; 2 P. D. 276.

stances before the bishop here. With respect to the reasons of public policy stated by the bishop in his reply, it must be remembered that he has not said that no litigation on these subjects shall take place in his diocese; but only that with reference to this particular case, and under these particular circumstances, it is against public policy that the proceedings should continue. Reasons of public policy were recognised as good reasons for declining to issue a commission in *Julius* v. *Bishop of Oxford.* (1) The case of *Reg.* v. *Corporation of Preston* (2), which may be relied on for the applicants, is not against the bishop's contention. That decision rather illustrates the rule that where discretion has been exercised at all the Court will not interfere.

Sir W. Phillimore, Q.C., appeared for the Dean of St. Paul's.

Sir H. James, Q.C., and *Moulton, Q.C.* (*Danckwerts*, with them), for the applicants, supported the rule. The applicants are entitled to have the questions raised by the representation decided by the tribunal appointed by the legislature. The terms of s. 9 of the Public Worship Regulation Act, 1874, are express that the bishop "shall" transmit the representation to the archbishop. He can place a stop on the proceedings only by acting strictly within the terms of the proviso, which are "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation." He must, therefore, consider the whole circumstances of the case before he can exercise his statutory power to stop the proceedings. It is unarguable that if he considered none of the circumstances this Court could not review his decision and compel him to exercise his discretion. If he considers some only of the circumstances he is not acting within his statutory power, because he has not considered the whole circumstances of the case; and if he considers all the circumstances of the case, and other circumstances which are not the circumstances of the case, he is equally not acting within his statutory power. The Court is not asked to review the bishop's reasons, but he must reason within the area provided by the statute. If it appears that he has reasoned outside that area; that he has taken into consideration matters which have nothing to do with the particular case before him, then his discretion can be reviewed. The direction in s. 9

(1) 5 App. Cas. 214. (2) 3 Times L. R. 665.

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that he shall state his reasons in writing adds force to this construction of the section. It is difficult to see why that direction was given unless it was for the purpose of enabling the bishop's decision to be reviewed if his statement of reasons shewed that he had failed to properly consider the whole circumstances of the case. It is contended that the bishop has not considered the whole circumstances of the case. He has misapprehended the decision in *Phillpotts* v. *Boyd.* (1) He has looked only at the result of that decision, and come to the conclusion that all figures of this character were held to be not idolatrous, and therefore could be lawfully put up in churches. No such question of principle was decided. The decision turned on the question of fact whether the figures in the sculptured representation in question tended to idolatry or were merely decorative. The Privy Council held that the structure could be lawfully erected because the principal figure merely formed part of a representation of the historical fact of the Ascension, and was not intended or likely to induce idolatrous veneration. Sir H. Keating, as assessor, had advised the Bishop of Exeter that all images, as distinct from ornaments, were unlawful. The judges of the Privy Council differed from that view, but the judgment delivered by Lord Hatherley expressly points out (at p. 467) that their Lordships desired it to be clearly understood that nothing decided in that case "affects the question of superstitious regard being paid, contrary to the 22nd Article of religion, to any representations or images that are, or may at any time be, set up in churches. The law," said Lord Hatherley, "will at all times be sufficiently strong to correct and control any such abuse; but their Lordships are of opinion that the sculpture in question is not liable to be impugned in that respect." The question is one of fact in each case, and it is an obvious fallacy to suppose, as the bishop here has supposed, that because the figures sculptured on the reredos at Exeter were lawful, those placed in St. Paul's Cathedral must also be lawful. The decisions in *Hughes* v. *Edwards* (2) and *Clifton* v. *Ridsdale* (3) also turned on the same question of fact. Neither of those cases has any bearing on the present, except to shew, no doubt, that the appli-

(1) Law Rep. 6 P. C. 435. (2) 2 P. D. 361.
(3) 1 P. D. 316; 2 P. D. 276.

cants must come before the Court with substance in their case. In saying that the main question of principle has already been decided in *Phillpotts* v. *Boyd* (1), and that the difference between the two erections is not of very grave importance, the bishop has assumed to decide the question of the lawfulness of the structure at St. Paul's Cathedral. Under the statute he cannot so decide that question except with the applicants' consent. Further, he has introduced something *plus* the circumstances of the case. In the concluding part of the statement of his reasons he shews that he has set himself against the statute. He assumes that the litigation would succeed, but says that litigation is an evil, and that in this case the result of it would not make up to the Church, and to the religious life of the country, the mischief which must inevitably be inflicted on them by the litigation itself. He says, in effect; "I stop the proceedings because I think that the legislature ought not to have given the right to institute them." Those general considerations of public policy have nothing to do with the circumstances of the case. The discretion given by the statute is not absolute, but is in the nature of a judicial discretion; and when it is clear that the bishop has not exercised it within the limits of the statute, this Court can review and control his exercise of the discretion. The case of *Julius* v. *Bishop of Oxford* (2) was a decision on 3 & 4 Vict. c. 86, where the words were wholly different, and no condition precedent to the exercise of the right to stop proceedings was imposed as in the Public Worship Regulation Act, 1874. The cases cited on the duties of magistrates do not conflict with the contention for the applicants. They only exemplify the principle that where a statute directs or empowers magistrates or others to do a certain thing, and vests in them a discretion with respect to the doing of it, they must obey the statute. It is clear that they cannot refuse to do the thing because they think the statute unjust: *Reg.* v. *Boteler.* (3) The same principle is laid down in *Estwick* v. *City of London.* (4) In *Reg.* v. *Corporation of Preston* (5) a local Act gave the corporation of Preston power to approve plans of proposed buildings,

(1) Law Rep. 6 P. C. 435.
(2) 5 App. Cas. 214.
(3) 33 L. J. (M.C.) 101.
(4) Style's Rep. 42.
(5) 3 Times L. R. 665.

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and provided that, if they refused to approve, they must give their reasons. The corporation refused to approve certain plans, because they disapproved of the site of the buildings, which the Act gave them no power to do. The Court (Mathew and A. L. Smith, JJ.) made absolute a rule for a mandamus directing the corporation to consider the plans, and exercise their discretion. In the present case there has been a clear breach by the bishop of a statutory duty to exercise his discretion after considering the whole circumstances of the case, and this rule for a mandamus should therefore be made absolute. [They also referred to *Reg.* v. *Lord Coleridge.* (1)]

Cur. adv. vult.

1889. June 1. The following judgments of the Court (Lord Coleridge, C.J., Pollock, B., and Manisty, J.) were read:—

MANISTY, J. This is an application by four inhabitants of the diocese of London, within which the Cathedral Church of St. Paul is situate—two being justices of the peace for the county of Middlesex, one being a lieutenant-general in Her Majesty's army, and the fourth being a barrister-at-law, and all of them being members of the Church of England as by law established—for a writ of mandamus commanding the bishop to transmit a copy of a representation, duly made to him by them pursuant to the provisions of the Public Worship Regulation Act, 1874, to the persons complained of—namely, the Dean and Chapter of the Cathedral Church of St. Paul—and to proceed thereon further in accordance with the said Act. In the alternative the applicants ask that the bishop may be commanded to proceed to consider the whole circumstances of the case affecting such representation, without considering any other circumstance or taking into consideration reasons other than the circumstances of the case. I propose to deal with the first head of the application only.

The representation stated as follows: [The learned judge read it.] I doubt whether the limitation of five years applies to the present case. See sub-s. 1 of s. 8 and the proviso at the end of s. 8, which applies only to an alteration in or addition to the fabric of the church, and not to a decoration forbidden by law.

(1) 45 L. J. (Q.B.) 649.

The point does not arise in the present case, as this representation was made within five years, but it may arise in another case if a succeeding bishop, after the expiration of five years, should entertain a different opinion to that of his predecessor, and upon a representation being made to him should send it on to the archbishop in order that the case should be tried.

Each of the applicants made and sent to the bishop a statutory declaration of the truth of the statements contained in the representation, as required by the 8th section of the Act of 1874. The bishop, on May 23, 1888, made a statement in writing, and deposited it in the registry of the diocese, and transmitted a copy to the present applicants and to the persons complained of, as required by the 9th section of the Act. [The learned judge read the statement.]

The applicants contend that the bishop had no power, without the consent of the parties, to decide (as he has done) that the crucifix or sculptured image of our Saviour on the cross, which is in question, is legal, and that he ought to be compelled, in accordance with the 9th section of the Act of 1874, to transmit a copy of the representation to the persons complained of, and to require them, and also the persons making the representation, to state in writing within twenty-one days whether they are willing to submit to his directions touching the matter of the representation without appeal; and that, if they do so, the duty of the bishop is forthwith to hear and decide the matter; but if the parties do not so submit, then that the bishop is, under the circumstances, bound to transmit the representation to the Archbishop of Canterbury, who is forthwith to require the judge of the Provincial Courts of Canterbury and York to hear the matter of the representation. The judgment of that judge is, by s. 9 of the Act, subject to appeal to the Queen in Council. The dean and chapter contend that it was in the absolute discretion of the bishop, without the consent of the parties and without even hearing them, to decide as he did, and to stop further proceedings on the representation.

The question raised by the representation, which the applicants seek to have finally determined by appeal, if necessary, to Her Majesty in Council, is whether the introduction into this reredos

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of a crucifix—that is to say, of an image or sculptured subject, 5 ft. in height or thereabouts, representing our Lord upon the cross—in a conspicuous position immediately above the communion table, is forbidden by law. The bishop in his statement says that, having considered the whole circumstances attending the representation, he is of opinion proceedings should not be taken upon it for the reason, that the main question of principle raised by the representation has been already decided in the *Exeter Case—Phillpotts* v. *Boyd* (1)—decided in February, 1875. In that case a reredos was held to be legal which shewed the figure of our Lord, in the act of ascending into heaven, in a conspicuous place immediately above the communion table. The bishop in the present case thought that further litigation was consequently inexpedient. In the course of his statement the bishop does not say the erection in the two cases is similar or the same; on the contrary, what he says is: "It is impossible to say the difference between the two is of very grave importance, or that the one offers serious temptation to idolatry and the other does not." His Lordship does not say that the difference is not of grave or any importance, but only that it is not of "very grave" importance. Again, he does not say that the crucifix in the present case does not offer temptation to idolatry, but only that it does not offer "serious" temptation.

I venture very respectfully to differ from the lord bishop as to the similarity of the two cases, and as to the effect of the judgment in the *Exeter Case*, which was commenced in 1873, consequently before the passing of the Act of 1874.

Two years after that judgment was pronounced—namely, in May, 1877—the case of *Ridsdale* v. *Clifton* (2) came before a committee of the Privy Council consisting of Lord Cairns, L.C., and Lord Selborne and eight other eminent members, the Archbishop of Canterbury and four other bishops attending as episcopal assessors. One of the questions was whether the placing and retaining a crucifix on the top of the screen separating the chancel of the church from the body or nave was illegal. The judgment will be found at p. 349, to the effect that the crucifix in question in that case was contrary to law. The case was

(1) Law Rep. 6 P. C. 435. (2) 2 P. D. 276.

most elaborately argued, and I will shortly refer to some passages of the judgment.

At pp. 350, 351 of the report (1) the judgment shews what pains the Court took, both in *Liddell* v. *Westerton* (2), and in the case then under consideration, to distinguish between crosses and crucifixes. Their Lordships state the grounds of their decision at pp. 352, 353. They cite the following passage from the judgment of Lord Penzance, which was under appeal; "When the Court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation, in a particular part of the church, and for the particular purpose of 'adoration'—when the Court finds that the same object, both in church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church *as an architectural ornament only*, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in 'decoration' may end in 'idolatry.' If this apprehension is a just and reasonable one, then there exists that likelihood of 'superstitious reverence' which the Privy Council in *Phillpotts* v. *Boyd* (3) pronounced to be fatal to the lawfulness of all images and figures set up in a church." The judgment of the Privy Council then proceeds: "In these observations of the learned judge their Lordships concur; and they select them as the grounds of his decision which commend themselves to their judgment. They are prepared, under the circumstances of this case, to affirm the decision directing the removal of the crucifix."

In the following month of June, 1877, the *Denbigh Case*, as it has been called, which is reported by the name of *Hughes* v. *Edwards* (4), came before the Court of Arches, and Lord Penzance, as Dean of the Arches, decided that a reredos, of which the central compartment consisted of a sculptured panel representing the crucifixion, and having the figure of our Saviour on the cross, 2 ft. 8 in. high, was not illegal; but in giving judgment

(1) 2 P. D. 276.
(2) Moore's Special Rep.
(3) Law Rep. 6 P. C. 435.
(4) 2 P. D. 361.

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he says (at p. 370), "I do not conceal from myself that the question is one upon which there is room for much difference of opinion." This case, though not referred to by the bishop in his statement, is, as an authority, stronger than the *Exeter Case* (1) in favour of the legality of the crucifix or sculptured image of our Saviour on the cross in the present case; but the facts are not the same, and one of the objects of the present applicants is to have that case reviewed if necessary, and to have it decided finally by Her Majesty in Council whether the crucifix in question is or is not contrary to law.

The question we have to decide is not whether the crucifix is legal or illegal, but whether, the Bishop of London having decided the question of law raised by the representation, and given his opinion that proceedings ought not to be taken upon the representation for a reason which, as it seems to me, is erroneous and bad in point of law, his Lordship ought to be compelled by means of the high prerogative writ of mandamus to allow the proceedings to be continued as provided by the 9th section of the Act of 1874.

The answer to this question seems to me to depend upon the true construction of the Public Worship Act, 1874. The preamble states that "it is expedient that in certain cases further regulations should be made for the administration of the laws relating to the performance of divine service according to the use of the Church of England." The question we have to decide arises on ss. 8 and 9. [The learned judge read them.] I think the context shews that "the whole circumstances of the case" which the bishop is to consider do not include the consideration and decision of an undecided question of law raised by the representation. By undecided, I mean not decided by the final Court of Appeal. His duty in such a case, as it seems to me, is to entertain the representation and follow the course prescribed by the Act for further proceedings. If the question had been decided by the final Court of Appeal it may be the bishop would have been justified in stating that fact as his reason for being of opinion that proceedings should not be taken on the representation; but it seems to me to be incredible that the

(1) Law Rep. 6 P. C. 435.

legislature intended to give every bishop absolute power, without the consent of the parties, or even hearing them, to decide a question of law which has not been decided by the final Court of Appeal, and stop the proceedings absolutely. If this be the law, it follows that every bishop may, for the time being, and, in my opinion, for that only, permit any image, however illegal, to be introduced into every church in his diocese. It is suggested that, if the bishop has such power, other proceedings may be taken by which the decision of the ultimate Court of Appeal can be obtained. I am by no means sure that such is the case —see *Sheppard* v. *Bennett* (1)—but if it be, it seems to me to afford a strong argument in favour of the contention that the legislature did not intend to give the bishop the power to prevent an appeal upon a question of law raised by a representation under the Act of 1874, which is intituled, "An Act for the better administration of the laws respecting the regulation of public worship."

It may be difficult to define what cases are within the jurisdiction of the bishop—that is to say, within the words, "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation," but I think those words may be satisfied by confining them to minor matters, such as the applicants not being duly qualified to make a representation, or the proceedings being frivolous and vexatious, which the bishop does not suggest as the reason for his opinion. I also think that the fact of the bishop being required to state in writing the reason for his opinion, and the provisions as to the course to be pursued, not only in case the parties consent to submit to his directions, but also in case of their not consenting, shew clearly that it never was intended to give the bishop the unlimited and absolute power now contended for. In construing an Act of Parliament the intention of the legislature is the point to be ascertained, and it must be collected from the whole of the provisions in the statute which bear upon the question. A thing which is within the letter of a statute is not within the statute unless it be within the intent of the legislature: Bac. Abridg. tit.

(1) Law Rep. 3 A. & E. 167.

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Statute I., 5; *Bridger* v. *Richardson* (1); *Simpson* v. *Unwin.* (2) I place great reliance upon the proviso in s. 9 that no judgment pronounced by the bishop, after the parties have submitted to his directions without appeal, shall be considered as finally deciding any question of law, so that it may not be again raised by other parties. This proviso by necessary implication gives other parties who do not submit to the bishop's directions power to make a representation and raise the same question, and the right to have it tried by the judge with power of appeal to the Queen in Council, thus shewing, as it seems to me, conclusively that it never was intended to give the bishop power finally to decide a question of law such as is raised in the present case, even as between the immediate parties, without their consent and without even hearing them. If this be not so, this absurd consequence follows, that if other parties by a representation raise the same question, and do not submit to the bishop's directions, the bishop may, nevertheless, stop the proceedings in limine, as he has done in the present case, thus rendering the proviso of no effect

I also place considerable reliance upon the words requiring the bishop to state in writing the reason for his opinion that proceedings should not be taken upon the representation, in the event of his being of that opinion. It cannot, I should think, be successfully contended that these words were inserted without an object, and that they are immaterial. The only suggestion made by the Attorney General was that probably these words were introduced in order to insure expedition, but they have no such effect, and expedition is provided for by other words. It seems to me that probably they were inserted for the purpose of preventing the bishop from exceeding his powers, and to enable the persons making the representation to get redress if he did exceed them.

If the view I take of the intention of the legislature be correct, then, in my opinion, it follows that the mandamus which is asked for should be issued. It is a high prerogative writ invented for the purpose of supplying defects of justice, and by Magna Charta the Crown is bound neither to deny justice to any one, nor to delay anybody in obtaining justice.

Allusion was made in the argument by the learned counsel for

(1) 2 M. & S. 568. (2) 3 B. & Ad. 134.

the dean and chapter to the case of *Reg.* v. *Lord Bishop of Oxford* (1), reported under the name of *Julius* v. *Lord Bishop of Oxford.* (2) That was a case under the Church Discipline Act, 1834 (3 & 4 Vict. c. 86), which was an Act to amend the manner of proceedings in causes for the correction of clerks in holy orders of the United Church of England and Ireland. It will readily be seen by a perusal of the Act and the judgments that the case is wholly different from the present.

In conclusion, I will venture to add that for the sake of all parties the sooner the question raised by the representation is finally decided the better. The bishop in his statement says that litigation keeps up irritation and party strife; it embitters men's feelings; it inflicts much mischief on the Church and on true religion. It is for those very reasons that I think the sooner litigation upon this vexed question of the legality of introducing crucifixes, such as the present, into churches is set at rest by the Court of final appeal the better it will be for the Church and all parties concerned. I should think no one is sanguine enough to suppose that the decision of the bishop in the present case will finally settle the question. I am of opinion that the writ of mandamus should be issued in the form first asked for by the applicants, and I would very respectfully ask the bishop to consider the observations I have made before he decides whether he will obey the writ and so send the case for trial, or whether he will appeal against it, and so continue litigation for an indefinite length of time.

POLLOCK, B. An order nisi was granted in this case, calling upon the Bishop of London to shew cause why a writ of mandamus should not issue directing him to transmit a copy of the representation of John Derby Allcroft and three other complainants, dated May 4, 1888, to the persons complained of—namely, the Dean and Chapter of St. Paul's—and proceed thereon further in accordance with the Public Worship Regulation Act, 1874.

The question now for our decision is whether that order ought to be made absolute.

(1) 4 Q. B. D. 245, 525. (2) 5 App. Cas. 214.

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The matter arises out of a proceeding under the Public Worship Regulation Act, 1874, whereby the prosecutors, being persons duly entitled to proceed under that Act, transmitted to the Bishop of London a representation which stated in substance that the Dean and Chapter of St. Paul's had within five years introduced, &c. [The learned judge read it.]

In answer to this representation the Bishop of London sent the following reply:—[The learned judge read the reply.]

It is said by the complainants that the reasons set forth by the bishop in this answer are insufficient, and so clearly insufficient that this Court ought to treat them as a nullity, and to require the bishop to transmit and proceed with their representation as if he had stated no reasons at all.

The decision of this question turns mainly upon the proper construction to be given to s. 9 of the Public Worship Regulation Act, 1874. Sect. 8 of that Act provides that if a certain class of persons (including such persons as the complainants) shall be of opinion "that in such church any alteration in or addition to the fabric, ornaments, or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church," they may represent the same to the bishop in a form given by the Act. By s. 9, subject to an exception which I will notice more fully presently, it is provided that the bishop "shall within twenty-one days after receiving the representation transmit a copy thereof to the person complained of, and shall require such person, and also the person making the representation, to state in writing within twenty-one days whether they are willing to submit to the directions of the bishop without appeal, and if they shall state their willingness to submit to the directions of the bishop without appeal, the bishop shall forthwith proceed to hear the matter of the representation in such manner as he shall think fit, and shall pronounce such judgment and issue such monition (if any) as he may think proper, and no appeal shall lie from such judgment or monition: Provided that no judgment so pronounced by the bishop shall be considered as finally deciding any question of law so that it may not be again raised by other parties." The section further enacts: "If the person

making the representation and the person complained of shall not, within the time aforesaid, state their willingness to submit to the directions of the bishop, the bishop shall forthwith transmit the representation, in the mode prescribed by the rules and orders, to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." Had this been the whole of the section, there can be no doubt that the words "the bishop shall transmit" would make it imperative upon him to forward a copy of the representation wholly irrespective of his own opinion, and it seems therefore unnecessary to enter upon the consideration of the many cases in which this Court has been called upon to decide upon such words as "may," "might," "it shall be lawful;" and, so far as this part of the case is concerned, it seems that little can be gained from the decision of the Court of Appeal and of the House of Lords in the case of *Julius* v. *Bishop of Oxford.* (1)

The section, however, begins with these important words:—"Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion, and such statement shall be deposited in the registry of the diocese, and a copy thereof shall forthwith be transmitted to the person or some one of the persons who shall have made the representation, and to the person complained of), he shall, within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of."

It is clear from this provision that the bishop is bound to consider the whole circumstances of the case, and from those circumstances to form an opinion whether proceedings should or should not be taken on the representation; and that he would be as much guilty of a dereliction of duty if he declined or omitted to do so, as he would be if he declined or omitted to transmit the representation. Every word contained in this exception is of importance. That there is a discretion vested in

(1) 4 Q. B. D. 245, 525; 5 App. Cas. 214.

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the bishop, and that it must be properly exercised is beyond dispute. The object which he is directed to attain is to decide whether proceedings should not be taken on the representation; but before arriving at that object he must form an opinion, and that opinion must be based upon a consideration of the whole circumstances of the case. There can, therefore, be no doubt that the bishop is bound, in the first place, to form his opinion upon considerations that arise within the scope of the Act of Parliament. If he were to say that in his opinion the adjudication upon any representation was an evil, and therefore that proceedings should not be taken upon the particular representation transmitted to him, his decision would be nugatory, and this Court ought to treat it as such. Again, if it could be shewn that the bishop had not considered the whole circumstances of the case within the statute, but that he had based his opinion upon a portion of those circumstances only, to the exclusion of others that were material, I should come to the same conclusion.

This part of the case was presented with logical accuracy by the arguments of the learned counsel who appeared for the complainants. Their joint effect may be stated as follows:—"We do not ask the Court," they said, "to review the bishop's reasons; but those reasons must be within the area created by the statute. He must consider the whole circumstances of the case. To omit one circumstance may be as bad as omitting all. So, to add a circumstance not within the proper area, may be equally mischievous; for, if he has included this within his reasons, he has not reasoned merely about the whole circumstances, but about these and something else. Further, the bishop is bound to shew by his written opinion that he has considered the whole circumstances, and that his opinion flows from them."

I accept and approve of the whole of this proposition; but in giving effect to it it must be borne in mind that the statute does not in any way set forth what are the reasons by which the bishop is to be guided in forming his opinion. These must be gathered from the whole circumstances of the case, and by applying to them such considerations as properly assist the mind in coming to the required conclusion. In some cases circumstances beyond those which arise out of the particular subject of the representa-

tion—such as the character of the church or of the congregation, the period of time during which the images objected to have been erected, the opinion and conduct which their erection may have elicited from those who are in the habit of attending divine worship at the particular church—ought to be considered before the opinion is formed. In other cases the mere form and character of the images themselves may suffice; but in all cases such general considerations as properly bear upon the determination of the question which it is the bishop's duty to solve—such as whether the proposed litigation is bonâ fide or vexatious; whether it is sought with the honest object of determining some principle affecting "the fabric, ornaments, or furniture" of the church, or with the view of re-arguing what has been already decided, or harassing opponents by unnecessary litigation—must find a place; and, further, it is impossible to lay down any rule by which this Court can dictate to the bishop what particular weight he ought to attach to some circumstances of the case rather than to others, or to the consequences to be derived from them.

In the present case, the reasons of the bishop appear to be confined to the character of the images objected to; and it is by considering this in connection with the existing law as laid down in a recent case, which deals with the legality of a similar image, that he arrives at his conclusion. If, upon reading the reasons which he has stated in writing and giving to them a fair and reasonable construction, I find that he has, after considering the whole circumstances of the case, arrived at an opinion that proceedings should not be taken, I am at a loss to discover any ground upon which I can treat that opinion as a nullity. When once it is admitted that the bishop has not only the right to exercise, but the duty expressly cast upon him by the statute of exercising, a discretion, it seems to me, adopting the language which was used by Earl Cairns in *Julius* v. *Bishop of Oxford* (1), that there is not "any occasion, or, indeed, any right, to examine into the manner in which, or the principles upon which, that discretion has been exercised. For the exercise of that discretion the bishop, and the bishop alone, is responsible, and it would, in

(1) 5 App. Cas. 214.

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my opinion, be inconsistent to hold that his discretion is an answer to the application for a mandamus, and at the same time on that application to criticize the grounds upon which that discretion has been exercised."

It would be inconsistent with what I have already said to enter at any length upon the consideration of what is the conclusion to which the bishop has arrived, and the means by which he has arrived at it; but as some arguments were used to shew that his conclusion, and the reasons upon which the opinion for it is based, are illusory, it may be right that I should add, were it only by way of illustration, what appear to me to be in effect and substance the grounds and the result of that opinion. It cannot be disputed that, if the subject-matter of the complaint could be shewn to be idem per idem with that which had been complained of before, and determined by the appropriate tribunal to be lawful, the bishop might properly say that the proceedings should not be taken; and again, if any distinction that could be taken between that which was now complained of and that which had previously been decided to be lawful was so trivial and non-essential as to be, in the opinion of the bishop, immaterial with reference to the ground upon which the complaint was based, he might equally come to the same conclusion.

Now, in considering whether the distinction is or is not material, the bishop may well have gone through the same process of reasoning as was adopted by Lord Penzance in the case of *Hughes* v. *Edwards*. (1) The Court had there to decide whether a sculptured image of Our Lord as crucified was illegal, it having been already held that an image of Our Lord representing His Ascension was lawful; and, in summing-up the considerations upon which his judgment was based, Lord Penzance said:—"What are the materials upon which a judgment has to be formed? The proposed erection is a fitting and natural architectural ornament. It is proposed to be placed in a part of the church where ornaments of the kind are not unfrequently found. It is not an isolated figure, but a group capable of artistic treatment. It differs only from a very similar erection which has been held lawful at Exeter in the circumstance that it portrays

(1) 2 P. D. 361.

the Crucifixion in the place of the Ascension; and it differs not at all in essentials from other representations of the Crucifixion which have hitherto been found harmless, such as that which has stood for so many years in St. Margaret's Church, Westminster. Why then, without more, it may be asked—why, without further evidence, should the probability of its abuse to superstitious purposes be declared to be established?"

I am averse to give much weight to an argument founded upon the question why should the legislature have intrusted to the bishop a power, the importance of which has not been overrated. Where the language used is clear and definite, such an argument in itself seems to imply a desire to escape from giving effect to the true construction of the statute; but it meets in the present case with another and perhaps practically a more powerful answer, namely, that the Act, beyond all doubt, gives to the bishop a discretion to decide whether or not the suit shall proceed, and in doing this it cannot escape from intrusting to the bishop the exercise of his judgment upon a matter of the greatest weight. Nor must it be forgotten, in measuring the extent of the discretion which is left to the bishop, that the statute in question is not one that creates a new offence, or that creates a new and sole remedy for an old offence, but that it is supplementary, and provides for the first time a new, more expeditious, and more convenient remedy for a mischief which could have been, and still can be, attacked by other modes; for it is still open to any one who complains of the structure and figures alluded to in the representation to proceed by the old procedure; and there is nothing irrational or inconvenient in supposing that the legislature, when it created this new and more easy remedy for the protection of those attacked, hedged it around by a special provision which insured that it should not be put in motion until the bishop had decided this preliminary question.

It was forcibly urged against the bishop's opinion that he had not sufficiently dealt with the question whether the images objected to were likely to produce idolatry, but the representation contains no allegation of actual idolatry other than may arise from the character and position of the images themselves; and as this has already been dealt with by the Courts which alone

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have jurisdiction to deal with such matters, the sole question raised is, whether the distinction between the images now complained of and those which have been pronounced to be legal is such that the present proceedings ought to be taken: and this is the very matter upon which the bishop, and not this Court, is to decide.

It was also argued that the reasons set forth were insufficient by reason of the last two paragraphs of the bishop's answer, the proposition being that, for aught that appears, the bishop may have founded his opinion solely upon what is stated in these paragraphs. To this I cannot assent. It may be that they might well have been omitted, but being there they must be read and construed by the light that is thrown on them by what has gone before, and to treat them as abstract reasons upon which alone the opinion has been based is contrary to the ordinary rules of construction; and, assuming that the reasons set forth in the earlier paragraphs are within the scope of the bishop's discretion, and that the last two paragraphs are to be treated, as they ought to be, as containing reasons which operated upon the bishop's mind, I cannot say that the "keeping up of litigation by raising minor points" is not an evil which ought legitimately to be taken into consideration when dealing with the question of proceedings which in the bishop's opinion tend only to raise a question which has in substance been already decided.

I have not overlooked the provision of the statute which requires that the bishop is to state in writing the reason for his opinion. The object of this probably was, not merely to avoid delay by requiring the bishop to act within a fixed time, but to ensure that he shall make public in writing the reasons for his opinion, as they must be transmitted to the persons who have made the representation and to the person complained of within twenty-one days; and no doubt they do in this way afford a security that the reasons shall not be illusory, but I cannot, in considering the earlier words of the section, give any different effect to them, because the bishop is to state his reasons in writing. To do so would be to create by a false inference an appeal to this Court where no such appeal is given by words; or, in other language, to turn the right of the complainant to a

mandamus into a right to appeal from the reasons and opinion of the bishop, although he has exercised the discretion with which he is invested.

In my judgment, therefore, the order nisi ought to be discharged.

LORD COLERIDGE, C.J. I regret to be obliged to differ from the conclusion at which my brother Pollock has arrived in this case. His judgment, however, sets out so fully and so accurately the facts upon which our judgment must turn, and describes upon the whole with such perfect correctness the principles which are to guide our judgment, that I am quite content to take these portions of his opinion as expressing my own. It is when we arrive at the application of the principles to the facts that I am obliged to part company.

Perhaps, however, it may tend to clearness if I very shortly summarize the case as more fully stated by Pollock, B. By the 8th section of 37 & 38 Vict. c. 85, a certain class of persons have a right to make complaints to the bishop; and the 9th section enacts what the bishop is to do upon the receipt of the complaint. He is, in short, (the words, it is to be observed, are imperative, "he shall,") to put the matter in train for adjudication unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reasons for his opinion, and such statement shall be deposited in the registry of the diocese, and a copy thereof shall forthwith be transmitted to the person, or some one of the persons, who shall have made the representation and to the person complained of).

These words are very direct and plain, and that they give the bishop a discretion it is quite impossible to deny. That discretion the Bishop of London has exercised in this case by refusing to allow any proceedings to be taken on the representation; and, in obedience to the statute, he has given what must be taken to be the reasons for his refusal in writing.

The bishop is a man of great ability and of the highest possible education. I do not assume for argument's sake, I really believe,

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that he meant his writing to contain his reasons—the reasons he was bound to give under the Act of Parliament; and that it is dealing fairly neither with the bishop nor with the case to hold that he took the opportunity to deliver a censure upon the litigious spirit, which might have found appropriate place in a sermon, but certainly had none in a legal statement of legal reasons, unless the censure represented, as I believe it did, his main reason, or one of his main reasons, for the exercise of his veto.

So, again, his statement that the judgment in *Phillpotts* v. *Boyd* (1) had decided the case, and that the complainants here were only "seeking to engraft an exception on the principle there laid down in a matter not of grave importance," is, I believe, meant to be taken by him, as I take it, for a statement of another main reason for refusing to allow the complainants to proceed. I can find no other reasons, no other references to the whole circumstances of the case, than these, and I have read his paper again and again with the real wish to discover anything further.

Are these reasons sufficient in law? Are they any part of the "whole circumstances of the case," which alone the bishop has a right to consider in forming his opinion? If they are, this rule ought to be discharged; if not, this rule ought to be made absolute.

Now, what are the undisputed facts of this case? It seems clear that there is no necessity for a faculty even for important alterations in the fabric of a cathedral church: *Phillpotts* v. *Boyd* (1). So that in a case like the present, in which the choir has been shortened by nearly forty feet, and the masterpiece of one of the greatest architects in the world has been altered, not by erecting the splendid baldachin or ciborium which Dean Milman tells us Wren had designed for it, the metropolis and the whole country are absolutely in the hands of five clergymen, the holders for a few years of the residentiary canonries, responsible to no one, and not controllable by any. A piece of work, costly and splendid no doubt, has been erected, rich in coloured marbles and gilding, and containing, certainly, the largest carved

(1) Law Rep. 6 P. C. 435 at p. 556.

crucifix which has been erected inside an English church since the Reformation, or, to speak more correctly, since the reign of Queen Elizabeth; and containing also a large statue of the Blessed Virgin with our Lord as an infant in her arms. By persons properly qualified it is desired to question the legality of this structure. The Bishop of London refuses his permission, and a precedent, surely a most important one, has been set which it is reasonably certain will be followed.

Now, in cases under the old Church Discipline Act (3 & 4 Vict. c. 86) it has been held by the House of Lords that the discretion of the bishop is absolute, and that, be the breaches of the law as gross, as numerous, as repeated as you please, if the bishop thinks the offender a good man, or he himself dislikes law, a whole parish is, under that Act, entirely without redress. It seems at first sight at any rate to be somewhat different under the Public Worship Regulation Act. That Act, it is true, was passed before *Julius* v. *Bishop of Oxford* (1) was decided; but it was passed long after the decision of *Reg.* v. *Bishop of Chichester* (2), in which fair warning had been given of what a Court, composed of very eminent men, might probably hold as to the absolute discretion of the bishop under the old law. Indeed they did hold it; for, having been counsel in the case, I desire to say that I am sure Mr. Justice Wightman stated with his usual accuracy the opinions of Lord Campbell and Sir William Erle, a statement published at the time in the reports, a statement which they must have read, but which was never challenged or questioned by the distinguished men on whose behalf Mr. Justice Wightman professed to speak, and whose opinions he said that he expressed. It is therefore, to my mind at least, highly probable that those who passed the Public Worship Regulation Act intended to place some restriction on the discretion of the bishop by compelling him to state his reasons in writing. Whether it has been so placed is, no doubt, a question not of mental intention, but of legal construction; yet if the bishop's discretion remains absolute as before, and if his reasons are, as it seems to me my brother Pollock's judgment makes them, practically unexaminable, I fail altogether to see that any change has been made in the law, or

(1) 4 Q. B. D. 245; 5 App. Cas. 214. (2) 2 E. & E. 209.

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that the very lightest fetters have been imposed on the will of the bishop. Indeed, if any change has been made, it has been made, if I understand my learned Brother, not indeed to strengthen, for you cannot strengthen what is already absolute, but to protect the discretion and make its exercise easier, inasmuch as to some minds to refuse permission, giving reasons which may be illusory but cannot be questioned, appears a less arbitrary proceeding than to refuse permission by a simple act of the will.

I am, therefore, of opinion that the reasons must be the reasons on which the bishop acted; they must be, or arise out of, the whole circumstances of the case; and if it is clear from the statement of them that they are no such reasons as the statute contemplates, they may be treated as if they were no reasons at all, and he may be ordered to proceed. With all respect, Lord Cairns' words, used as to the discretion under the earlier Act, are not in point here. Under that Act the discretion was absolute, and the relevancy or irrelevancy of the reasons, given or to be collected, for its exercise could not affect its validity. It would cease to be absolute if a Court, thinking the reasons for it bad reasons, could set the exercise of it aside. I agree to this, but I deny that under the Public Worship Regulation Act the discretion is absolute. It must be founded upon reasons, and if the reasons cannot be considered, they had much better not be given. I disclaim altogether a right to pronounce upon their sufficiency, but I claim the right to examine their relevancy and their accordance with the Act of Parliament. Suppose a bishop were to write, "I find that Mr. Blank denies the cup to the laity, reserves the host, reads the prayers in Latin, has a separate altar for the Blessed Virgin, over which he places her crowned form, and so forth, and that he has succeeded in emptying his church; but he is a very good man, very generous, and very old; his closing years should not be troubled with law, to which I have a great objection, and which never, in my opinion, tends to edification, and therefore, under all the circumstances of the case, I forbid all further proceedings." This sounds like a travesty, but it is hardly an exaggeration of what has already been done in other cases; and, if I follow my learned Brother, in such a case as this a temporal Court has its hands absolutely tied.

I will be no party to such a decision. I must leave it to the higher tribunals of the country to say, as they are bound to say if they think it, that the reasons to be given by the bishop need have no form even of reasoning about them, need not even tend to, or have any bearing on, the conclusion which professes to be based upon them, and that if the bishop selects any one or two things which have passed through his mind while considering the case, states them, and goes on to say that he has considered the whole circumstances of the case, then there is an end of the matter, and no Court can further interfere. If a Court the authority of which binds me so decides, I shall, of course, whatever private opinion I may entertain, adhere loyally as a judge to what has been so decided. At present, the bishop's general objection to litigation does not appear to me to be such a reason as I ought to hold to be a compliance with the plain meaning of the Act of Parliament.

There remains to be considered the only other reason which I can extract from the bishop's paper—namely, that this case has been really decided by the decision in *Phillpotts* v. *Boyd*. (1) Now the Bishop of London was for many years Bishop of Exeter. He is therefore familiar, as I chance to be myself, with both these structures, and I must express respectful amazement that he can see the smallest similarity between them, or can think that the judges who decided the *Exeter Case* had the least idea that their words would or could be taken by any one to decide the legality of a structure so essentially different from the structure with which they were dealing as is this reredos of St. Paul's. But it appears to me that not only does one case not cover the other by fair inference, but that the *Exeter Case* has been expressly determined not to cover this case by the Privy Council itself. The structure with which their Lordships were dealing in *Phillpotts* v. *Boyd* (1), and the mode in which they dealt with it, is so clearly described, and the language is so important, that I quote it at length (2): "What, then, is the character of the sculpture on the reredos in the case before their Lordships? For what purpose has it been set up? To what end is it used? And is it in danger of being abused? It is a sculptured work in high relief,

(1) Law Rep. 6 P. C. 435. (2) Law Rep. 6 P. C. at p. 466.

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in which are three compartments. That in the centre represents the Ascension of our Lord, in which the figure of our ascending Lord is separated by a sort of border from the figures of the Apostles, who are gazing upward. The right compartment represents the Transfiguration, and the left the Descent of the Holy Ghost on the day of Pentecost. The representations appear to be similar to those with which every one is familiar in regard to the sacred subjects in question. All the figures are delineated as forming part of the connected representation of the historical subject. The Ascension necessarily represents our Lord as separated from the Apostles, who are gazing at Him on His Ascent. As finials to the architectural form of the reredos, there is on each side a separate figure of an angel. It is plain to their Lordships that the whole structure has been set up for the purpose of decoration only. It is not suggested that any superstitious reverence has been or is likely to be paid to any figures forming part of the reredos, and their Lordships are unable to discover anything which distinguishes this representation from the numerous sculptured and painted representations of portions of the sacred history to be found in many of our cathedrals and parish churches, and which have been proved by long experience to be capable of remaining there without giving occasion to any idolatrous or superstitious practices. Their Lordships are of opinion that such a decorative work would be lawful in any other part of the church; and, if so, they are not aware of any contravention of the laws ecclesiastical by reason of its erection in the particular place which it now occupies. Their Lordships desire it to be understood that nothing decided in this case affects the question of superstitious regard being paid, contrary to the 22nd Article of Religion, to any representations or images that are, or may at any time be, set up in churches. The law will at all times be sufficiently strong to correct and control any such abuse; but their Lordships are of opinion that the sculpture in question is not liable to be impugned in that respect."

No one, I think, can have seen the Exeter reredos without entirely accepting the correctness of the description, and the sense and justice of the judgment. It is a sculptured picture, or rather a series of sculptured pictures, " set up for the purpose of

decoration only," and a man must be indeed in Scripture phrase "wholly given to idolatry" who could pick out a particular figure or figures from these separate groups to worship or to pray to.

But this very judgment came under review in the case of *Clifton* v. *Ridsdale* (1), decided by Lord Penzance, and again in the appeal from Lord Penzance's judgment to the Privy Council (2). The *Exeter Case* was binding on Lord Penzance, and he professed to decide in accordance with it. He, however, directed the removal of a crucifix, not only on the ground that it had been erected without a faculty, but that it was in itself unlawful; and if there had been a faculty for its erection, he said he should none the less have ordered it to be removed. Mr. Ridsdale appealed upon four grounds, and the judgment, which has since become famous, was delivered by Lord Cairns. It was the judgment of himself and ten other judges—two were said to have dissented—with five episcopal assessors. Whether judges are to be weighed or numbered no judgment can possibly carry greater weight or authority. On two points, not material now to be stated, Lord Penzance was reversed; on another, also immaterial to the present case, he was affirmed; on the question of the crucifix he was also affirmed; and on this subject Lord Cairns expressly quoted and adopted the language of Lord Penzance, and made it part of the judgment of the Privy Council. This portion of the judgment is also so important that, as before, I quote it fully:—

"The learned judge whose decision is under appeal thus describes the screen and crucifix:—

'There is a screen of open ironwork some nine feet high stretching across the church at the entrance to the chancel. The middle portion of this screen rises to a peak, and is surmounted by a crucifix or figure of our Saviour on the cross in full relief and about eighteen inches long—this is the crucifix complained of. . . . .'

"Their Lordships are of opinion that, under the circumstances of this case, the ordinary ought not to grant a faculty for the crucifix."

Lord Cairns then states that Lord Penzance in his judgment referred to the two cases of *Liddell* v. *Westerton* (3), and *Phillpotts*

(1) 1 P. D. 316. (2) 2 P. D. 276.
(3) Moore's Special Report.

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v. *Boyd* (1); and, after setting out Lord Penzance's observations on *Liddell* v. *Westerton* (2), Lord Cairns' judgment thus proceeds:—

"The other case is that of *Phillpotts* v. *Boyd*. (1) As to this case, the learned judge states that this tribunal, in justifying the erection of the Exeter reredos, adhered entirely and very distinctly to the position taken up in the previous case, and pronounced that erection lawful, though it included many sculptured images, on the express ground 'that it had been set up for the purpose of decoration only,' declaring that it was 'not in danger of being abused,' and that it was 'not suggested that any superstitious reverence has been, or is likely to be, paid to any of the figures upon it.'

"The learned judge then proceeds to consider whether it would be right to conclude that the crucifix in the present case was set up for the purposes of decoration only; whether it is in danger of being abused, and whether it could be suggested that superstitious reverence had been, or was likely to be, paid to it.

"The learned judge states that the crucifix, as formerly set up in our churches, had a special history of its own.

"He refers to the rood ordinarily found before the Reformation in the parish churches of this country, which was, in fact, a crucifix with images at the base, erected on a structure called the rood loft, traversing the church at the entrance to the chancel, and occupying a position not otherwise than analogous to that which the iron screen does in the present case.

"He refers to the evidence as to the preservation of the crucifixes or roods during the reign of Queen Mary, and of their destruction, as monuments of idolatry and superstition, in the reign of Elizabeth. . . . .

"The learned judge arrives at the conclusion that the crucifix so placed formed an ordinary feature in the parish churches before the Reformation, and that it cannot be doubted that it did so, not as a mere architectural ornament, but as an object of reverence and adoration. . . . .

"Proceeding then on these considerations, and dealing with a church in which was found not merely an illuminated crucifix,

(1) Law Rep 6 P. C. 435. (2) Moore's Special Report.

but also those stations of the cross and other acts in the conduct of the services, the illegality of which the appellant does not challenge in his appeal, the judge continues thus:—

'It is no doubt easy to say, what proof is there of danger of idolatry now? What facts are there to point to a probability of abuse? But when the Court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation, in a particular part of the church and for the particular purpose of "adoration"—when the Court finds that the same object, both in the church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church as an architectural ornament only, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in "decoration" may end in "idolatry."

'If this apprehension is a just and reasonable one, then there exists that likelihood and danger of "superstitious reverence" which the Privy Council in *Phillpotts* v. *Boyd* (1) pronounced to be fatal to the lawfulness of all images and figures set up in a church.'

"In these observations of the learned judge their Lordships concur; and they select them as the grounds of his decision which commend themselves to their judgment. They are prepared, under the circumstances of this case, to affirm the decision directing the removal of the crucifix, while at the same time they desire to say that they think it important to maintain, as to representations of sacred persons and objects in a church, the liberty established in *Phillpotts* v. *Boyd* (1), subject to the power and duty of the ordinary so to exercise his judicial discretion in granting or refusing faculties, as to guard against things likely to be abused for the purposes of superstition."

Now, at first sight it would seem that this is a distinction drawn in point of law by the highest possible authority—none, I should have supposed, was necessary for drawing it in point of fact and sense—between the crucifix or the rood and sculptured groups representing other scenes either in the history of our Lord or in that of the Old and New Testaments. But it is insisted that the crucifix in *Ridsdale* v. *Clifton* (2) was on a screen, and that it was from the position of it, and from the fact that it was, as it were, the successor or reproduction of a feature in the pre-Reformation Churches in this country which had been specially condemned, that Lord Penzance and the Privy Council

(1) Law Rep. 6 P. C. 435. (2) 1 P. D. 316; 2 P. C. 276.

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deduced the probability of its being abused for superstitious purposes and decreed its removal. It is true that the crucifix in that case was on a screen between nave and chancel, and that here it is on a screen which fences off the east end of the cathedral from the choir by about 40 ft.; but I cannot think that the Privy Council intended to insist on this distinction. The rood screen was by no means universal, even in England, in cathedrals: at least since the introduction of organs, I believe it to have been very unusual. In foreign countries also of the Roman obedience it was, I believe, by no means a common feature; but the holy rood, either Christ on the Cross alone or with St. Mary or St. John on either side, was to be found universally, or, if that be too strong a word to be safely used, at least almost universally in some part of every church either over some altar or elsewhere. Wherever it was, assuredly it was not a decoration only, though a decoration it might be, but an object of reverence and devotion; and an architect of the middle ages would have been indeed surprised if he had been told that the holy rood was only to be a finial, or a corbel, or a capital—a piece of architectural decoration. No one will doubt this who looks even at so common a book as Viollet le Duc's Dictionary of Architecture, or any book on Christian iconography. The rood or the crucifix, wherever placed, has been, and has been intended for, an object of worship; a finial, a corbel, an angel, a bas-relief of the Nativity, the Epiphany, the Last Supper, has not.

The Privy Council were dealing with a crucifix which, though on a screen, was 18 inches high, which they ordered to be removed; the figure of our Lord in this case is 5 feet high, and it is supposed because it is in another sort of screen that the Privy Council have actually permitted it; and, further, that to say they have not is an attempt the sole object of which is to engraft an exception on their judgment in a matter not of grave importance. I must take the freedom to say that it is not only legal minds which in the stress of argument are led to confound things essentially and inherently distinct. If this be not in the ordinary sense of the word a crucifix or rood, and if it be not obviously, at least, liable to abuse, one must distrust the evidence of one's eyes and unlearn all one's history. It may be that an

18 inch crucifix on a screen is more liable to abuse than one 6 or 7 feet high (I speak of the crucifix) in a screen, but to say that a judgment which forbids the first allows the last as an "architectural decoration" is, to my mind, to pervert the plain meaning of the judges, and to evade the force of their language by classing under the term "architectural decoration" something to which the term is utterly inapplicable, and has never been applied since Christian history began. Pictures and painted windows are outside the argument. No one ever worshipped a painted window or a picture, unless it were one of those miracle-working paintings which, so far as I have ever seen them, are in a very different sense of the word miraculous indeed.

The construction, therefore, placed by the Bishop of London on the case to which he refers as his authority appears to me so entirely mistaken that I must treat any reason founded upon that construction as no reason within the statute.

I do not forget the two cases of *Combe* v. *Edwards* (1), and *Hughes* v. *Edwards* (2), in both of which, under circumstances very different from the present case, a bas-relief of the Crucifixion and a small movable crucifix were allowed; but I do not refer to them at length because the bishop does not refer to them; and I am concerned with the law only so far as it enters into the bishop's reasons. For the same reason I do not refer to *Durst* v. *Masters* (3), in which, also under very different circumstances, a crucifix was disallowed.

There is a matter on which very little has been said, but on which I must add a word. In the second paragraph of the representation complaint is made of the erection of an image of the Blessed Virgin, 5 feet 6 inches high, with the Holy Child in her arms. This figure is crowned, and is of the size of life. It is no part of my duty to say a word upon the propriety of the position of this image, still less on the religious questions connected with the office and worship of the Blessed Virgin; but certainly, when one remembers the feelings and controversies of but a few years ago, to find the Bishop of London treating as a matter of no importance whether it is lawful to erect a statue of the

(1) 2 P. D. 354. (2) 2 P. D. 361.
(3) 1 P. D. 373.

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Madonna, robed and crowned as the Queen of Heaven, Regina Cœli (1), 5 feet 6 inches high, over the altar at the east end of the Metropolitan Cathedral of St. Paul is a proof, if of nothing else, of the fact that human affairs never continue in one state. I suppose it is to be classed with other so-called "architectural decorations," and, if so, what I have said upon that subject must be taken to include what I have to say as to this statue. If, however, it were granted to me, as I have no reason to think it would be, that my view of the law as laid down in, or to be collected from, *Ridsdale* v. *Clifton* (2) is absolutely correct, it would, as I understand my Brother, be replied to me that it made no difference; that we cannot examine the bishop's reasons; and that if as one of the whole circumstances of the case he has considered the state of the law, and (as we think) has mistaken the law, it makes no difference. He has considered the case; he has given his reasons bonâ fide, and there is an end of the matter. I cannot think this. I admit it is difficult to draw the line in words, but there must be a line. Suppose the bishop were to give as his reason that the proceedings in this case had not been taken in time because he considered "five years" in the 8th section of the Public Worship Regulation Act really meant three or two, or that, at all events, it was highly inexpedient that anything should be done to touch a building after three years or two, I suppose (I speak with due doubt) that no one would say that a Court of Law was bound to treat such a statement as any reason at all. If so, I am of opinion that for the bishop to mistake the meaning of a decision on which he founds his own is a reason for a Court of Law setting aside the bishop's action, as not founded on the condition precedent required by Parliament.

I have given my reasons for differing from the bishop's construction, and, right or wrong, I am bound to act upon my opinion and disregard the reasons he has given.

Two short observations I desire to make before I conclude. In thus deciding I am not yielding to any feelings or prejudices

(1) Lord Coleridge has since appended the following note to his judgment: "This is a mistake; in point of fact the Madonna is not crowned, and I regret that my eyes should have so far misled me as to lead me to make this statement. C."

(2) 1 P. D. 316; 2 P. D. 276.

of my own as to the matter in dispute. Personally, I have no objection whatever to the crucifix, nor the least desire to discourage its use, on any grounds outside the law. As a beautiful and touching symbol of the greatest event in the world's history, if the law allowed, I would gladly welcome it. Dr. Arnold has left upon record his wish for its re-introduction. Neither did the great Luther himself object, nor have the churches of the Lutheran confession in any way for more than three centuries objected, to its public use. In many parts of Protestant Europe a crucifix is to be found in every church. But there it is allowed by law; here, as I think, it is not, and this makes all the difference.

For this is my second and last remark. The only real importance, or, at any rate, the great and general importance, of this case to my mind is that, if my view be correct, the supremacy of law will at least be to some extent established over all the subjects of the Queen. I think it very mischievous that in matters which touch the inner life and the sincere religious feelings of men, when, as in matters of ritual, men must either join in what they honestly believe to be false and abject superstition, or cease to attend the services of a Church which is, perhaps, endeared to them by a thousand memories and associations, or when they believe, as men do believe, that the practices and the outward forms of a building or a worship are in direct violation of the laws of the Church to which they belong, and yet are forced upon them by the will of a single ecclesiastic, I think it in such cases very mischievous that such men, when they want honestly to try whether this or that practice is or is not within the law of their Church, should be met by the simple will of a bishop, who tells them that the matter shall not even be discussed, and that like naughty schoolboys they must learn to obey their spiritual pastors and masters. A dispensing power cannot be safely lodged in hands entirely irresponsible; and to say this is quite consistent with the truest personal respect for those who sometimes, in my opinion, misuse it. The better a man is, the more averse to strife, the holier, the gentler in his own conversation, the more will he be tempted to disregard the law, and, if he has the power, to prevent its being put in force

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against men of whose goodness and earnestness he is persuaded and whose lives he honours. I recognise this, and in a sense I highly respect it. But as a lawyer I am before and above all things for the supremacy of law, and it is because I think that the later Act does limit discretion to some extent that I am so anxious not to fritter it away. Under the old law the bishop had this to say—that he was in form a party to the proceedings; that his office was being promoted; and there was some reason, therefore, under the old Church Discipline Act, which dealt with procedure only, why he should still be allowed to say whether he would or would not permit his discipline to be enforced. Under the Public Worship Regulation Act this is not so. The bishop is not a party to the proceedings, and therefore, unless there is some real reason capable of being clearly stated, the matter should be suffered to go on. And if, in such a case as this, these reasons are to be held sufficient, we may as well admit at once that as to all religious observances, although we belong to a Church clothed with dignity and maintained in a magnificent position by the law, our rights are not those which the law gives us, but what a few dignified ecclesiastics may from time to time determine.

I am of opinion that this rule should be made absolute.

Rule absolute.

Solicitors for the Bishop of London and the Dean and Chapter of St. Paul's Cathedral: *Lee, Bolton, & Lee.*

Solicitors for the Dean of St. Paul's: *Brooks, Jenkins, & Co.*

Solicitors for the applicants: *Wainwright & Baillie.*

W. A.

[IN THE COURT OF APPEAL.]

CORNISH *v.* THE ACCIDENT INSURANCE COMPANY, LIMITED.

1889
July 2;
Aug. 9.

Insurance against Accident—Exception of Accident caused by "exposure of the insured to obvious risk."

A policy of insurance against accidental death or injury excepted from the risks insured against accidents happening "by exposure of the insured to obvious risk of injury." The insured met his death through attempting in broad daylight to cross the main line of a railway in front of an approaching train by which he was run over and killed. There was no evidence that he was short-sighted or deaf. At the place where the accident happened there was no station, or proper crossing; and there was no obstruction to prevent a person about to cross from seeing an approaching train. There was no ground for imputing negligence to the servants of the railway company:—

Held, that, the risk incurred by the insured being one, which either was obvious to him, or would have been obvious to him, if he had been paying reasonable attention to what he was doing, the case came within the exception in the policy.

APPEAL from the judgment of Lord Coleridge, C.J., at the trial with a jury.

The action was brought upon a policy of insurance against death or injury by accident by the widow and administratrix of the insured. The policy excepted from the insurance the case of "death or disability arising from fighting, duelling, the hands of justice, intentional self-injury, whether under the influence of insanity or not, injuries sustained on a railway whilst travelling otherwise than in a passenger carriage, or whilst getting into or alighting from any carriage in motion, or whilst acting in violation of the bye-laws of a railway company, or occasioned by poison, or happening by exposure of the insured to obvious risk of injury, or whilst the insured should by intoxicating liquors be rendered less capable than usual of taking care of himself, or whilst performing any unlawful act, &c." The insured was run over and killed by a train whilst attempting to cross the main line of the Great Western Railway under circumstances which are sufficiently stated in the judgment. The Lord Chief Justice directed the jury that the case fell within the exception in the policy, the accident having happened through the insured exposing himself to obvious risk; and the jury thereupon returned

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a verdict to the effect that they were compelled by the ruling of the Lord Chief Justice to find that the deceased lost his life by incurring obvious risk, but that they were of opinion that it was an ordinary misadventure. The Lord Chief Justice thereupon gave judgment for the defendants.

Jelf, Q.C., and *A. T. Lawrence*, for the plaintiff. The ruling of the Lord Chief Justice was incorrect. The "exposure to obvious risk" contemplated by the policy is a wilful and foolhardy exposure to a risk obvious to the insured. The exception does not contemplate the mere case of a person negligently exposing himself to a risk which he fails to perceive. The word "obvious risk" means a risk which is in fact obvious. It is not sufficient to bring a case within the exception that the risk might have been obvious if due care had been used. There was nothing here to shew that the insured wilfully or voluntarily exposed himself to a risk of which he was aware, though he may have been negligent. The scope of such a policy is to insure a man against his own carelessness or thoughtlessness as much as any other dangers. In order to come within the exception there must be an intention to run a risk. They cited *Schneider* v. *Provident Life Insurance Co.* (1); *Burkhard* v. *Travellers' Insurance Co.* (2)

Reid, Q.C., and *Fooks*, for the defendants. An obvious risk is a risk which any one of ordinary sense could see to be a risk, if he took ordinary care. "Obvious" includes what a man ought to have seen. If the test were what was in fact obvious to the particular man, all kinds of difficulty must arise. It is an obvious danger to step on to a main line of rails on which trains are constantly passing without looking up and down to see if a train is coming.

Jelf, Q.C., in reply.

Cur. adv. vult.

Aug. 9. The judgment of the Court (Lord Esher, M.R., Lindley, and Bowen, L.JJ.), was delivered by

LINDLEY, L.J. This is an action brought by the legal personal representative of the late Richard Cornish to recover the sum of

(1) 1 American Rep. 157. (2) 48 American Rep. 205.

1000*l.*, being the amount for which he had effected a policy with the defendants. Mr. Cornish was a farmer in Herefordshire. He had a farm which was intersected by a railway. He was in the habit of crossing the railway to get from one part of his farm to the other, and was killed whilst so doing in broad daylight one day in July, 1887. He had crossed the line to get a match from a man in a field on the other side. He had got the match and was recrossing. He had just got on the line of rails nearest to him, i.e., the down line, and was recrossing, when a train on that line knocked him down and killed him. At the place in question there was no station; no proper crossing; no obstruction to prevent a person about to cross from seeing an approaching train. There was no evidence that the deceased was short-sighted or deaf. A train on the up line had passed shortly before the accident happened, and the deceased, who was then on the other side of the line, had seen this train coming and had waited for it. Whether he saw or heard the down train which killed him, or whether he did not, it is impossible to say. But, if he did not see or hear it, he would, nay, he must, have done so, if he had been paying attention to what he was doing. There is no ground for imputing negligence to the persons in charge of the train which knocked him down. Under these circumstances the deceased met his death by what may be properly called an accident, although his own want of care unquestionably contributed to his death. The jury in effect found that he was killed by accident, as will be seen presently. But the policy excepts from the risks insured against cases of death happening by "the exposure of the insured to obvious risk of injury"; and the defendants contend that this case falls within this exception, and that consequently they are not liable on the policy. The Lord Chief Justice was of this opinion, and he so directed the jury. The jury found as follows: "We are compelled by the ruling of the Lord Chief Justice to find that Mr. Cornish lost his life by incurring obvious risk, but we are of opinion that it was an ordinary misadventure."

The question we have to determine is whether the direction of the Lord Chief Justice was right.

The exception on which the defendants rely is so worded as to

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leave several important matters in doubt. The words are "exposure of the insured to obvious risk of injury." These words suggest the following questions: Exposure by whom? Obvious when? Obvious to whom? It is to be observed that the words are very general. There is no such word as "wilful," or "reckless," or "careless"; and to ascertain the true meaning of the exception the whole document must be studied and the object of the parties to it must be steadily borne in mind. The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory. A man who crosses an ordinary crowded street is exposed to obvious risk of injury; and, if the words in question are construed literally, the defendants would not be liable in the event of an insured being killed or injured in so crossing, even if he was taking reasonable care of himself. Such a result is so manifestly contrary to the real intention of the parties that a construction which leads to it ought to be rejected. But, if this be true, a literal construction is inadmissible, and some qualification must be put on the words used. In the American cases cited by Mr. Jelf, the language of the policy was different, but the foregoing reasoning was adopted by the Court. The real difficulty is to express the necessary qualification with which the words must be taken. In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. Without attempting to paraphrase the language so as to meet all cases, it is, we think, plain that two classes of accidents are excluded from the risks insured against, viz. (1) accidents which arise from an exposure by the insured to risk of injury, which risk is obvious to him at the time he exposes himself to it; (2) accidents which arise from an exposure by the insured to risk of injury, which risk would be obvious to him at the time, if he were paying reasonable attention to what he was doing. This last qualification is in accordance with the ruling of Cockburn, C.J., in *Lovell* v. *Acci-*

dent Insurance Co. Limited (1), a note of which has been furnished to us, and is warranted by the language used and by the objects to be attained. Any construction short of this would be going too far in one direction, just as a literal construction would be going too far in the other.

We accept the view of the jury that this accident may be called an ordinary misadventure, but the question is whether the policy covers it. We think not. We are not prepared to say that injuries occasioned by the negligence of the insured are in all cases excepted. Such a construction would render the policy little better than a snare to the insured. But there are degrees of negligence, and we are unable to read this policy as protecting a man against the consequences of running risks which would be obvious enough to him if he paid the slightest attention to what he was doing. In the present case the deceased did in fact expose himself to risk of imminent death: that is quite clear. If he looked and saw the train coming, the risk to which he exposed himself must have been obvious to him at the time. If the risk to which he exposed himself was not then obvious to him, that circumstance can only be accounted for on the supposition that he was not attending to what he was doing, i.e. not looking to see if a train was coming, and was near. We cannot construe the policy as covering a risk so run, and we agree with the Lord Chief Justice that there was no question of fact to leave to the jury. The appeal, therefore, ought to be dismissed with costs.

BOWEN, L.J. I concur in the judgment just delivered. I should be disposed to go even further, and to say that the risk the insured incurred was obvious as being evident to his senses. This was a main line of railway which could not be crossed like a street, and to cross it in such a place without looking whether a train was coming was to incur an obvious risk of imminent death. I think that a person who takes such a risk incurs a risk evident to himself.

Appeal dismissed.

Solicitors for plaintiff: *Lovell, Son, & Pitfield.*

Solicitors for defendants: *Wynne, Baxter, & Kebble.*

(1) Not reported. E. L.

1889
July 2.

WALKER AND WIFE *v.* HOBBS & Co.

Landlord and Tenant—Housing of the Working Classes Act, 1885 (48 & 49 *Vict. c.* 72), *s.* 12—*Implied Condition as to State of Premises—Right to recover Damages for Breach.*

By s. 12 of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), "in any contract for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation":—

Held, that a tenant has, under that section, a right to sue his landlord for damages for injuries caused by the premises not being reasonably fit for human habitation owing to any defective state of repair.

MOTION by way of appeal from the County Court of Lambeth.

In November, 1887, the plaintiffs took from the defendants three rooms in a block of buildings in Bermondsey at a rent of less than 8*s.* a week. At the time of the letting some of the plaster had recently fallen from the ceiling, and had been repaired by the landlords. Shortly afterwards there was a second fall of plaster, and, finally, in July, 1888, some more plaster fell which injured the female plaintiff.

The plaintiffs then brought the present action, and based their claim upon three grounds: (1) breach of warranty that the ceiling was sound; (2) wrongfully leaving the ceiling in an unsafe condition; and (3) upon s. 12 of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72). The county court judge held that there was no case upon the first two grounds; but upon the third left the case to the jury, who found a verdict for the plaintiffs for 50*l.*

The defendants appealed.

A. Clavell Salter, for the defendants. The only question in this case is whether the defendants are liable under s. 12 of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72). Upon the proper construction of the Act no promise by the landlord is implied, upon which the tenant can bring an action. The section only makes the promises of the tenant conditional upon the premises being reasonably fit for habitation, and gives

him the right to leave the premises and refuse to pay his rent if the premises are not so. At common law there is no implied covenant by the landlord that the premises are reasonably fit for habitation or occupation: *Hart* v. *Windsor* (1); and the landlord is not liable to his tenant for any injury arising from the condition of the premises. If this section is construed as imposing such a contractual liability it will make such an alteration in the law as could never have been intended.

Secondly, the Act is a purely sanitary Act, applying only to sanitary matters, and s. 12 must be construed as providing that dwellings must be fit for habitation in respect of all sanitary matters only. It does not apply to a defective state of repair generally. This appears from the words of s. 5, which speaks of "premises in a condition or state *dangerous to health*, so as to be unfit for human habitation."

Lambert, for the plaintiffs, was not heard.

LORD COLERIDGE, C.J. The learned county court judge was perfectly right in his construction of this Act. The facts of this case are shortly that the plaintiffs went into these rooms as tenants; the ceilings were in a ruinous and dangerous condition and fell down and seriously injured the female plaintiff. It is admitted that the ceilings were in a dangerous condition, and therefore that the rooms were not, speaking in a broad sense, fit for human habitation.

The question is whether this action will lie, that is, whether the landlord is liable to an action for damages under s. 12 of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72). That section provides that "in any contract made after the passing of the Act for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation." It is admitted that this part of a house was not reasonably fit for habitation, and that the condition was not fulfilled. It is contended by the defendants that the word "condition" in this Act is to be construed according to the strict common law meaning

(1) 12 M. & W. 68.

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Lord Coleridge, C.J.

of the term, and that it only means that the tenant may, at his option, repudiate the contract of tenancy if the condition is not fulfilled; but that it does not imply any promise by the landlord to the tenant. The term "condition" might have that limited meaning in some Acts, but it would be utterly irrational so to construe it in this Act. The object of the Act was to provide the working classes with reasonably fit and proper dwellings, and therefore to bind the landlords to provide such dwellings. It would not afford much protection to the tenant if his only remedy was to give up his tenancy, and turn out after he had been injured by the improper condition of the dwelling. The reasonable interpretation of the Act is that it imports a promise by the landlord to the tenant that the dwelling is reasonably fit for habitation, upon which promise, if it is broken, the tenant can sue. The judge was quite right in leaving it to the jury to say whether the dwelling was reasonably fit for habitation, and this appeal must be dismissed.

MATHEW, J. I am of the same opinion. The term "condition" in this section does not mean simply a condition precedent affecting the whole consideration for the contract of tenancy; but even if it did, it would, in my opinion, upon the most technical construction, imply a promise by the landlord to the tenant.

Appeal dismissed.

Solicitor for plaintiffs: *Worsfold.*

Solicitors for defendants: *Bonner, Wright, Thompson, & Co.*

H. D. W.

[IN THE COURT OF APPEAL.]

1889
May 3.

IN RE BROCKELBANK. EX PARTE DUNN & RAEBURN.

Bankruptcy — Discharge of Bankrupt — Misdemeanour under Debtors Act, 1869—*Bankruptcy (Discharge and Closure) Act,* 1887 (50 *&* 51 *Vict. c.* 66), *s.* 2, *sub-ss.* 1, 3—*Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 13.

Sect. 2 of the Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), provides (1) that a debtor who has been adjudged bankrupt under the Bankruptcy Act, 1869, and who has not obtained his discharge, may apply to the Court for an order of discharge; and (3), that, on the hearing of the application, the Court may either grant, or refuse, or suspend the order of discharge, or may grant a conditional order; "provided that the Court shall refuse the discharge in all cases where the Court is satisfied by evidence that the debtor has committed any misdemeanour under Part 2 of the Debtors Act, 1869, or any amendment thereof":—

Held, that the proviso has no application to a case in which the misdemeanour was committed after the adjudication of bankruptcy.

APPEAL by creditors of the bankrupt against an order of discharge granted to him under the Bankruptcy (Discharge and Closure) Act, 1887.

The adjudication of bankruptcy was made in 1878 under the Bankruptcy Act, 1869. The bankrupt did not obtain an order of discharge, and in February, 1889, he applied to the Court, under the Bankruptcy (Discharge and Closure) Act, 1887, for his discharge. The application was opposed by some of the creditors in the bankruptcy, on the ground that the bankrupt had committed a misdemeanour under Part 2 of the Debtors Act, 1869.

It appeared that the bankrupt had at the Middlesex Sessions in June, 1882, been convicted of having in 1880 obtained goods on credit by false pretences, and had been sentenced to six years' penal servitude.

The registrar held that the Court could not take into consideration an offence committed after the bankruptcy, and having no connection with the bankrupt's property distributable among his creditors.

The opposing creditors appealed.

Sidney Woolf, for the appellants. By reason of the proviso at

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the end of sub-s. 3 of s. 2 (1) of the Bankruptcy (Discharge and Closure) Act, 1887, the registrar had no power to grant the discharge. The proviso directs that "in all cases" where such a misdemeanour has been committed by the bankrupt the Court "shall refuse the discharge." The registrar had no discretion. The proviso applies to an offence committed after the adjudication and before the application for a discharge. The Debtors Act applies even where there has not been any bankruptcy: *Reg.* v. *Rowlands.* (2) It is not necessary that the bankrupt should have been convicted under the Debtors Act, or even that he should have been convicted at all. It is sufficient if credit was in fact obtained by false pretences: *Reg.* v. *Peters.* (3) Under s. 27 of the Bankruptcy Act, 1883, the bankrupt could be compelled to answer any question bearing upon his discharge, even though his answer might tend to criminate him.

The bankrupt appeared in person.

LORD ESHER, M.R. In this proviso the legislature have used language of the widest kind—"in all cases"—so wide that, if its full grammatical meaning be given to it, the proviso will produce injustice so enormous that the mind of any reasonable man must revolt from it. When the language of the legislature

(1) Sect. 2 provides: (1) "A debtor who has been adjudged bankrupt, or whose affairs have been liquidated by arrangement under the Bankruptcy Act, 1869, or any previous Bankruptcy Act, and who has not obtained his discharge, may apply to the Court for an order of discharge, and thereupon the Court shall appoint a day for hearing the application in open Court."

"(3.) On the hearing of the application the Court may hear any creditor, and may put such questions to the debtor, and receive such evidence as the Court thinks fit, and, on being satisfied that the notice required by this section has been duly sent and published, may either grant or refuse the order of discharge, or suspend the operation of the order for a specified time, or grant the order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the debtor, or with respect to his after-acquired property: Provided, that the Court shall refuse the discharge in all cases where the Court is satisfied by evidence that the debtor has committed any misdemeanour under Part 2 of the Debtors Act, 1869, or any amendment thereof."

Sect. 13 of the Debtors Act, 1869, which is in Part 2 of that Act, provides that, "any person shall be deemed guilty of a misdemeanour" (inter alia) "if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud."

(2) 8 Q. B. D. 530.

(3) 16 Q. B. D. 636.

construed literally involves such consequences, the Court has over and over again acted upon the view that the legislature could not have intended to produce a result which would be palpably unjust, and would revolt the mind of any reasonable man, unless they have manifested that intention by express words. The Court will not infer such an intention from the use of merely general words. Some limit must, therefore, be put upon the words of the proviso, and they must be limited with reference to the subject-matter which is treated of. We have not to construe s. 18 of the Debtors Act, which has nothing to do with bankruptcy; we have to construe sub-s. 3 of s. 2 of the Discharge and Closure Act, which says that the Court shall refuse the discharge "in all cases" where it is satisfied that the debtor has committed any misdemeanour under Part 2 of the Debtors Act. What is the meaning of the words "in all cases"? The sub-section is dealing with what the Court is to do with reference to the discharge of a bankrupt, and I think the words must be limited by the subject-matter — the particular bankruptcy — with which it has to deal, and that they are to be read thus, "in all cases connected with or arising out of the bankruptcy in question." That is a reasonable limitation, and, in my opinion, the words must be read in that way. If the debtor has obtained credit by false pretences in a matter connected with the bankruptcy in question, then the Court is to refuse to give him a discharge. If he has incurred by false pretences a debt which is still subsisting, that is a matter connected with the bankruptcy. But if he incurred the debt forty years ago, and it has been satisfied, that is a matter which has nothing to do with the bankruptcy. The matter which is to be inquired into is to be inquired into in the Bankruptcy Court, and in a bankruptcy proceeding, and this suggests the nature of the limitation which must be put upon the words. This construction will shut out the case which I have just put, and it will equally shut out anything done by the bankrupt after the bankruptcy in question, in respect of which the creditor could not come in and prove in the bankruptcy. Such a matter is not connected with or arising out of the bankruptcy. Therefore, in my opinion, the registrar had no jurisdiction to inquire into this matter, and his decision is right.

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LINDLEY, L.J. I am of the same opinion. If we were to adopt the view of the appellants, the Court would have to inquire into the conduct of the bankrupt from the time when he attained years of discretion down to the time when he makes the application for his discharge. I cannot think that the legislature intended this. Their language will, no doubt, admit of that construction, but the consequences would be so startling, that I shrink from so interpreting it. The legislature is dealing with the case of an undischarged bankrupt, and is giving directions to the Bankruptcy Court what it is to take into consideration in deciding whether it shall grant a discharge to the bankrupt. That Court is concerned with the property of the bankrupt and the persons who are his creditors, and has nothing to do with anything else. That is the leading idea which limits the object of the legislature. The inquiry which the Court has to make relates to the bankrupt's creditors, and the property which is to be distributed among them, and I do not see what the Court has to do with anything else. The misdemeanour alleged to have been committed by this bankrupt has no relation to the property which is or ought to be distributable among his creditors. To say that the Court is bound to inquire into a matter with which the creditors have nothing to do would be to put an unreasonable construction on the section.

LOPES, L.J. The words of the proviso are so wide that they would be unreasonable and produce injustice unless some limitation is put on them. They must be read with reference to the subject-matter of the Act. It is entitled "an Act to amend the law relating to the discharge of bankrupts and the closure of bankruptcy proceedings," and, in my opinion, it gives the Court jurisdiction with regard to matters connected with or arising out of the bankruptcy in question, and does not give it jurisdiction with regard to anything else, and I agree that the words "connected with or arising out of the bankruptcy" must be interpolated after the words "in all cases" in sub-s. 5 of s. 2. The conviction relied on in the present case related to a matter entirely outside the bankruptcy, and I think the registrar's decision was right.

Appeal dismissed.

Solicitor: *C. A. Clulow.*

W. L. C.

CLIMPSON *v.* COLES AND ANOTHER.

1889
Jan. 17;
April 10;
May 4.

Bill of Sale—Registration—Building Agreement—Mortgage—Power of Mortgagee to enter—Sale of Materials—Power to sell Materials independent of Power of Entry—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 8.

By a mortgage deed the plaintiff assigned to the defendants certain land and buildings in course of erection thereon, "and also all bricks, timber, slates, and other building materials which may at any time hereafter be brought by or for the mortgagor into the said premises for completing the said buildings."

The plaintiff covenanted "that all bricks, timber, &c., which shall be brought upon the premises, &c., shall be considered as immediately attached to and forming part of the fee simple of and in the same premises, and no part of the said bricks, &c., shall be removed from the premises but with the concurrence of the mortgagees," and "that in case the mortgagor shall not proceed with the completion &c., to the satisfaction of the mortgagees, it shall be lawful for the mortgagees to enter upon the premises and to seize and take possession of all bricks, &c., and other building materials, and to complete the said messuages."

The deed further provided that in case of default by the mortgagor it should be lawful for the mortgagees to sell all or any part of the hereditaments or premises, and all bricks, timber, slates, and other materials standing and being thereon, or on any part thereof, either together or in parcels, &c. :—

Held, that, inasmuch as it gave a power to sell the building materials, which was independent of the power to enter upon and take possession of the premises, and might be exercised without the latter power being exercised, the deed was an assurance of personal chattels, or a licence to take possession of personal chattels as security for a debt, within the meaning of s. 4 of the Bills of Sale Act, 1878, and therefore was a bill of sale, and was void under s. 8 of the Act of 1882 for want of registration in respect of the personal chattels comprised therein.

In re Yates, Batcheldor v. *Yates* (38 Ch. D. 112), distinguished.

CROSS-MOTIONS to enter judgment on a counter-claim based on a mortgage deed dated February 13, 1886.

The nature of the action, the pleadings, the facts and arguments are fully stated, and the cases cited are dealt with and commented on in the judgment of the Court.

1889. Jan. 17; April 10. *Reid Q.C.*, and *Robert Wallace*, for the trustee of the plaintiff.

M. J. Muir Mackenzie, and *W. Baker*, for the defendants.

Newson, for Colbran, a receiver in Chancery.

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Marshall Hall, for Mrs. Climpson, the owner of the equity of redemption, who had been made a defendant to the counter-claim.

Cur. adv. vult.

May 4. The judgment of the Court (Denman and Stephen, JJ.) was delivered by

DENMAN J. The plaintiff Climpson sued the defendants Coles and Carr, solicitors, for an alleged wrongful conversion of certain building materials and plant seized by the defendants as afterwards explained.

The defendants justified the seizure under a deed of February 13, 1886.

They also counter-claimed, alleging that the plaintiff, on several dates from October 10, 1883, to October, 16, 1886, by several indentures, including that of February 13, 1886, under which the seizure was justified, mortgaged a great number of separate hereditaments at Eastbourne to secure separate sums amounting in the aggregate to upwards of 11,000*l.* and interest.

They further alleged that each of the said indentures contained a provision enabling the defendants to consolidate their mortgages, so that one could not be redeemed without the others, and that the whole amount on these indentures still remained due; and that the other defendants to the counter-claim had, or claimed to have, interests in the equities of redemption of the said hereditaments or some of them.

They then alleged that it would be expedient, for the purpose of taking the accounts, that the action should be transferred to the Chancery Division, and claimed:

(1.) That an account should be taken of the moneys due under the several mortgages mentioned.

(2.) Judgment for the amount so found.

(3.) In default of payment foreclosure.

(4.) That the action may be transferred.

(5.) A receiver.

(6.) Such further relief, &c.

The plaintiff joined issue on the defence, and further alleged that the deed of February 13, 1886, was void by the Bills of

Sale Act, 1882, ss. 8 and 9, at least so far as it makes personal chattels a security for the payment of money, the objection relied on being want of registration.

By way of defence to the counter-claim the plaintiff alleged that, in the case of the other mortgage deeds previous to those mentioned in the counter-claim, it was never suggested to him by the defendants, who were his solicitors as well as the mortgagees, that the defendants were entitled to refuse to allow the plaintiff to pay off the moneys advanced on any deed unless the moneys advanced on other mortgages were also paid off; that when the deeds mentioned in the counter-claim were executed he, the plaintiff, was not aware that there had been inserted in them the provision for consolidation referred to in the counter-claim, nor had he ever agreed to such a provision, nor was he informed of the fact by the defendants, who were his sole legal advisers; and he executed the said deeds, relying upon the good faith of the defendants as his solicitors, and without reading the same, nor would have consented to the provision being inserted had he had knowledge of the fact and of the effect of the same.

He then states that he is willing to have accounts taken of the sums, if any, due from him on each particular mortgage.

The case came on to be tried before Manisty, J., in July last, and occupied several days. It was agreed early in the course of the trial that the question raised under the Bills of Sale Act, 1882, was a pure question of law to be decided by the learned judge, and before the case was concluded it was agreed that if the plaintiff should be held entitled to recover for a conversion the damages should be assessed at 25*l.*

This left only one question requiring the consideration of the jury, viz., that raised upon the counter-claim and the defence to it, whether the plaintiff was bound by the consolidation clause in the deed of February 13 or not?

[The Court then proceeded to discuss the evidence on which this question turned, which related entirely to questions of fact, and continued as follows:—]

The learned judge left the following question to the jury:—

"Was the plaintiff *told and made aware* of the effect of the clause called the consolidation clause?"

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The jury retired, and after an absence of nearly three hours returned the following verdict in writing: "We are of opinion that the plaintiff's *attention was called* to the consolidation clauses, but that *they were not sufficiently explained for the plaintiff to understand them.*"

Upon this finding the learned judge gave judgment for the plaintiff on the defendants' counter-claim to have the account taken on the basis of a consolidation of the mortgages. But he gave judgment for the defendants upon the plaintiff's claim in respect of a conversion, ordering that the 25*l.*, the value of the goods seized by the defendants, should be taken into account in the account which the plaintiff admitted must be taken in respect of the deed of February 13, 1886. Cross rules were argued before us, the defendants contending that the judgment ought to be entered for them upon the counter-claim on the basis of consolidation, or a new trial had upon that part of the case; the plaintiff contending that the judgment ought to be given for him upon the claim for the agreed sum of 25*l.*, on the ground that the document of February 13, 1886, was void, as being an unregistered bill of sale so far as the right to seize the plant and materials was concerned.

[The Court then dealt with the arguments used on the defendants' rule and proceeded:—]

On the whole we have come to the conclusion that we ought not to disturb the verdict of the jury, and that the judgment as regards the counter-claim must stand.

With regard to the other question raised upon the plaintiff's motion it entirely depends upon the construction of the deed of February 13, 1886, and the cases relating to bills of sale.

The deed was made between the plaintiff, described as "the said mortgagor," of the one part, and the defendants, described as "the said mortgagees," of the other part.

It recited that the mortgagor was then erecting three houses on land thereinafter described, and thereinafter expressed to be assigned, and that he had applied to the mortgagees to lend him 2700*l.* to enable him to complete the same, on the security of the said premises, to be advanced as thereinafter mentioned, that is to say, 65*l.* on the execution of the deed, and the remainder by

instalments of *l.* per cent. on the value of the buildings as their erection proceeded, such value to be ascertained and certified under the hand of the mortgagees' surveyor at the expense of the mortgagor.

The material parts of the deed were as follows:—

The mortgagor, "in pursuance of the said agreement, and in consideration of 65*l.* paid by the mortgagees, the receipt of which he acknowledges, and also in consideration of the further sums to be advanced by instalments as aforesaid," covenanted that he would, on May 13 next, pay the sum of 2700*l.*, or so much thereof as should have been then advanced with interest on the whole 2700*l.* at 5*l.* per cent., to be calculated from the date of the deed and also the amounts paid and due for the surveyor's certificates. It was then witnessed as follows:—

"The mortgagor doth hereby assign and transfer to the mortgagees all those pieces of land" (describing them), "and also all those three messuages now being erected thereon by the mortgagor, *and also all bricks, timber, slates, and other building materials which may at any time hereafter be brought by or for the mortgagor into the said premises for completing the said buildings,* to have," &c., "for all the term, estate, and interest of the mortgagor."

Then followed a proviso that if the mortgagor paid all sums then due by virtue of the indenture on May 13 the indenture should be absolutely void.

Then followed, amongst others, the following covenants by the mortgagor:—

1. To complete the buildings with all convenient speed.

2. "That all bricks, timber, slates, building materials, and other things which shall be brought upon the premises by or for the mortgagor for the purpose of completing the said messuages *shall be considered as immediately attached to and forming part of the fee simple* of and in the same premises, and no part of the said bricks, &c., shall be removed from the premises, but with the concurrence of the mortgagees in writing."

3. "That in case the mortgagor shall not proceed with the completion, &c. to the satisfaction of the mortgagees it shall be lawful for the mortgagees to enter upon the premises and *to*

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Denman, J.

seize and take possession of all bricks, &c., and other building materials and to complete the said messuages, &c."

The deed contained the following proviso:—

"If the mortgagor shall make default in payment of the said sum of 2700*l.*, or any part thereof which shall have been then advanced or paid in pursuance hereof, with interest, on May 13 next, or become bankrupt &c., whilst any money remains due on this security, it shall be lawful for the mortgagees at any time thereafter without any further consent of the mortgagor to sell all or any part of the said hereditaments or premises, and all bricks, timber, slates, and other materials standing and being thereon, or on any part thereof, either together or in parcels, either by public auction or private contract, with full power to make any stipulation as to title or otherwise as they may think fit, and to rescind any contract for sale and to resell without being responsible for any loss occasioned thereby, and to execute all such assurances as they may deem expedient, and in the meantime and until such sale, being in actual possession of the premises or in receipt of the rents thereof, to demise the same premises or any part thereof for any term not exceeding twenty-one years, &c."

It was contended before the learned judge at the trial on behalf of the plaintiff that this deed was a bill of sale, "void" for want of registration "in respect of the personal chattels comprised therein" under s. 8 of the Bills of Sale Act, 1882.

The learned judge thought that the case was covered by the decisions relating to building agreements, and held that it was not a bill of sale requiring registration.

This question was elaborately discussed before us, and most, if not all, of the cases bearing upon the point were cited.

In *Brown* v. *Bateman* (1), decided in 1866, it was held that an instrument containing some clauses almost identical with those relied upon by the defendants in the present case was not either "an assurance of personal chattels" or a "licence to take possession of personal chattels *as a security for a debt*" within the Bills of Sale Act (17 & 18 Vict. c. 36) then in force. In that case the deed was not a mortgage by the builder to the money lender, but a deed whereby the owner of land agreed to demise

(1) Law Rep. 2 C. P. 272.

such land to the builder for ninety-nine years at certain rents as soon as the builder should have erected messuages upon the land.

It was argued for the plaintiff that this distinction made that case inapplicable; but we cannot see that it makes any difference. In the present case the deed begins by assigning the whole estate of the mortgagor, both in the land and in the materials on the land for the completion of the buildings, to the mortgagees.

The clauses in that deed relating to the materials being considered as belonging to the premises, and relating to the right to enter and *take possession* of the land *and materials* thereon, were undistinguishable in effect from those in the deed of February 13, 1886.

In substance, therefore, it appears to us that the relation between the mortgagor and mortgagees in the present case is precisely the same as that of the parties to the instrument in *Brown* v. *Bateman* (1), so far as the clauses relating to everything except the right to sell is concerned, as to which it was suggested that different considerations apply—a point to be dealt with further on.

That case was soon afterwards followed in the case of *Blake* v. *Izard*. (2) The deed in that case was given by Izard to one W. S., a builder, and contained a clause that all materials brought upon the land should *become the property* of W. S., the intended lessor. The builder not having completed the building, and an execution on the materials having been put in, the intended lessor claimed the materials under the deed, and succeeded in maintaining his claim against the execution creditor. Willes, J., in that case said: "This Court has in the case of *Brown* v. *Bateman* (1) decided to respect the evident intention of the parties under these agreements. . . . It has been contended that it is a bill of sale. That question has been set at rest by *Brown* v. *Bateman* (1), which shews that stipulations in the nature of building agreements are not within the scope of the Bills of Sale Act." In this judgment Keating and Montague Smith, JJ., concurred.

(1) Law Rep. 2 C. P. 272. (2) 16 W. R. 108.

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The case of *Ex parte Newitt, In re Garrud* (1), does not appear to us to be at all at variance with the two last mentioned cases. The words of the agreement in that case were so different from those in the former cases and in this case as to prevent it from being an authority in favour of either party; but it is clear that the Lord Justices throughout assume that *Brown* v. *Bateman* (2) was rightly decided.

James, L.J., at p. 527, says "In *Brown* v. *Bateman* (2), all materials brought upon the premises by the builder for the purpose of erecting the buildings were to be considered as immediately attached to the premises, and were not to be removed without the landlord's consent," which he mentions as a possible distinction between *Ex parte Neuitt* (1), and *Brown* v. *Bateman.* (2)

The decision in *Ex parte Newitt* (1) appears to have proceeded solely upon the ground that there the deed provided that the right to take possession of the chattels did not arise upon non-payment of any debt, but only upon the non-performance of the agreement to complete the buildings; and therefore, although the deed contained a "licence to take possession of personal chattels," this was not "as security for a debt." It is to be observed, however, that the deed did give the lessor power to enter, and provided that the materials on the premises should be forfeited to the lessor, amongst other things, for non-payment of the rent.

In *Reeves* v. *Barlow* (3), affirmed in the Court of Appeal (4), it was held that a building agreement containing a clause that all materials brought upon the land should become the property of the intended lessor, whether affixed to the freehold or not, was not a bill of sale within the Act of 1878.

The Court held that the document was not a bill of sale; but the whole argument turned upon the words of the Act of 1878, and not upon the words relied upon by the plaintiff in the present case.

The words there relied upon as bringing the document within the Bills of Sale Act of 1878 were "an agreement by which a

(1) 16 Ch. D. 522.
(2) Law Rep. 2 C. P. 272.
(3) 11 Q. B D. 610.
(4) 12 Q. B. D. 436.

right in equity to personal chattels is conferred." The words relied upon in the present case were precisely the same as those contained in the previous Act of 1854 as well as those in the Act of 1878, viz., "assurances of personal chattels" or "licences to take possession of personal chattels as security for a debt," which were the very words relied upon in *Brown* v. *Bateman.* (1) So far from throwing any doubt upon the decision in *Brown* v. *Bateman* (1), A. L. Smith, J., in giving judgment, says: "It is manifest from the cases of *Brown* v. *Bateman* (1), *Blake* v. *Izard* (2), and *Ex parte Newitt* (3), that the contract in question was not a bill of sale within the meaning of the Bills of Sale Act, 1854." (4) And it is clear from Lord Justice Bowen's judgment in p. 439 of the report of *Reeves* v. *Barlow* (5), in the Court of Appeal, that he considered the clause in *Reeves* v. *Barlow* (5) providing that the property brought on the land "should pass to the lessor" to be exactly the same in effect as the clause in *Brown* v. *Bateman* (1), and in the present case "that it should be considered as being attached to and part of the premises."

It was contended on the part of the plaintiff that none of the cases cited on the other side applied to the present case, and that the deed of February 13, 1886, was a bill of sale requiring registration. One ground for this contention we have referred to above as in our opinion being untenable.

It was also argued that, inasmuch as in this case there was a power to sell any part of the materials upon the land *separately* upon default in the performance of any part of the mortgagor's agreements, including that to repay the 65*l.* that was advanced upon the execution of the deed, the case fell within the requirements of the Bills of Sale Act according to the tests given by the Court of Appeal, especially in the cases of *In re Burdett* (6) and *In re Yates.* (7) We do not think that the case *In re Burdett* (6) goes at all further than to decide that, where a deed is executed which mortgages both personal chattels and other property, such deed is valid as regards the other property, if it is

(1) Law Rep. 2 C. P. 272.
(2) 16 W. R. 108.
(3) 16 Ch. D. 522.
(4) 11 Q. B. D. at p. 614.
(5) 12 Q. B. D. 436.
(6) 20 Q. B. D. 310.
(7) 33 Ch. D. 112.

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possible to sever the provisions of the deed into two parts, so as to apply its provisions to each species of property independently of the other. The deed in that case contained no provisions relating to building. It was a mere ordinary bill of sale in form, and the only question was whether the deed was void in toto under s. 9 of the Bills of Sale Act, 1882, for want of compliance with the Act, on the ground that some of the property conveyed was "trade machinery," which by s. 5 of the Act of 1878 is excluded from the definition of "personal chattels" contained in s. 4 of that Act.

The Court in that case does not seem to have held that in every possible case in which the deed deals with property which, if it were dealt with alone, would make the deed a bill of sale, the deed necessarily falls within the Act, and it certainly does not lay down any rule as to the application of the Act to building agreements with clauses such as those contained in the present case.

In re Yates (1), the other case relied upon by the plaintiff, lays down a test which seems to us applicable to the present case. That was a mortgage in consideration of an advance of 950*l.*, which the mortgagor covenanted to repay on a certain day with interest agreed. It conveyed certain land and buildings with a proviso for reconveyance on payment of principal and interest. It was agreed that the powers in s. 19 of the Conveyancing and Law of Property Act, 1881, should be exercisable at any time after February 7th next, without it being necessary to serve the notice required by s. 20 of the Act (i.e., it gave power "to sell the mortgaged property or any part thereof either together or in lots when the mortgage money became due" (ib. s. 19)). Upon the mortgaged property was a considerable amount of trade fixtures coming within the description of "trade machinery," as defined by the Bills of Sale Act, 1878, s. 5, and therefore coming within the description of "personal chattels," according to the exception in s. 4 of that Act. But, inasmuch as s. 7 of the Act provides that no fixtures are to be deemed to be separately assigned by reason only that they are assigned by separate words, or that power is given to sever them from the building to which they are

(1) 38 Ch. D. 112.

affixed, or if by the same instrument any freehold or leasehold interest in the building to which they are affixed is conveyed to the same person, it was held that the mortgage was not an assignment of the "trade machinery," which only passed by virtue of being fixed to the freehold, and that the deed gave no power to take possession of the machinery as chattels, and that the power of sale did not authorize the mortgagee to sell the trade machinery apart from the freehold, and that therefore the deed was not a bill of sale of the "trade machinery."

The decision, therefore, was against the application of the Bills of Sale Act to such a case.

But the ground of that decision was one which cannot apply to a case like the present, in which the "chattels" seized are pure chattels, and in which the power to deal with them is not a power to be derived from an Act of Parliament, but from the agreement of the parties themselves. The judgment of Cotton, L.J., at p. 120, very clearly draws the distinction; he says: "The mortgage is simply a conveyance of the land; it gives the mortgagee a right to the trade machinery, not as something assigned by the deed, but as annexed to the land, and so passing by the conveyance of the land. Nor, I think, does it give the mortgagee power to take possession of chattels. It empowers him to take possession of the land, but he can take possession of the trade machinery in no other way than by taking possession of the land to which it is affixed. Where an instrument is simply a mortgage of the fee simple of a freehold property it cannot be such an instrument as is pointed out by the Bills of Sale Act, an instrument authorizing the holder to take possession of chattels apart from the land on which they are. I hold that under this mortgage the mortgagee had no power to sever the chattels from the land. He would *only have a right to do so if a power of sale was given to him which authorized him to sell them separately.*"

Lindley, L.J., at page 124, says: "The question is whether a mortgagee of a mill, under a mortgage framed as this is, can seize, and sever, and sell, apart from the land or mill, the trade machinery on it. *If he can, then it strikes me that, as regards trade machinery, it would be impossible to avoid the conclusion that this is a bill of sale,* and void because it is not registered." He

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agrees in holding that the deed in that case was not a bill of sale, because "the trade machinery passes as a portion of the land, not as personal chattels," and at page 126 he says: "*If the mortgagee of a mill wants to have the power of selling the trade machinery apart from the mortgaged property he must have a bill of sale.*"

Now it is true that there is nothing in the two last mentioned decisions to overrule the cases of *Brown* v. *Bateman* (1), or *Blake* v. *Izard* (2); but, on the other hand, there is nothing to shew that those decisions can extend to a case where the deed *does* give express power to the mortgagee to enter upon the land and sell any materials which he may find there, intended to be used for the completion of the buildings which the mortgagor had covenanted to erect, in a case where the power to enter and sell the materials is given "upon the neglect to pay money due for advances, as well as for any other default."

It seems to us impossible to hold that the very extensive words in the deed of February 13, 1886, do not give the mortgagee power, upon default in payment of the advances made, *to sell* any "bricks, timber, slates, or other building materials standing and being on any part of the premises" without even entering on the premises except so far as is necessary for raising the amount required, and disposing of the goods.

We think it impossible to hold that the mere provision "that the materials brought upon the premises for the purpose of building shall become part of the fee simple" can exempt them from the operation of the Bills of Sale Act, and prevent them from being "personal chattels" within the meaning of that Act.

Therefore, applying the test given by the learned judges of the Court of Appeal in *In re Yates* (3), and finding no provision there such as that contained in the present case with regard to the power of selling those "personal chattels," which are the subject of the action, we feel bound to hold that the plaintiff is entitled to judgment upon his claim for the 25*l.* and not merely to have the benefit of it in account.

Our judgment, therefore, upon both motions must be in favour

(1) L. R. 2 C. P. 272. (2) 16 W. R. 108.
(3) 38 Ch. D. 112.

of the plaintiff, and of course he is entitled to the costs of the action and of the counter-claim down to the present time, and of both the motions heard before us. The costs of Colbran and Mrs. Climpson of and occasioned by their having been served with notice of the defendants' rule to be paid by defendants.

We say nothing at present about any future costs to be incurred in taking the accounts upon the basis which we hold to be applicable as above mentioned.

Judgment for the plaintiff.

Solicitor for plaintiff; *G. R. Grant.*
Solicitors for defendants: *Tippetts & Son.*
Solicitors for Colbran: *Alfred Hicks & Arnold.*
Solicitors for Mrs. Climpson: *Prince & Co.*

P. B. H.

[IN THE COURT OF APPEAL.]

June 29.

IN RE LAMB.

Solicitor—Striking off Roll—Re-admission—Petition—Jurisdiction—Attorneys and Solicitors Act (6 & 7 *Vict. c.* 73), *s.* 32—*Practice—Appeal—Dismissal—Re-hearing—Enlargement of Time.*

Although, upon an application to strike a solicitor off the rolls for an offence under s. 32 of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73), such as allowing an unqualified person to practise in his name, the Court may have a discretionary power to inflict a punishment short of striking him off the rolls, yet, if the Court does make an order striking him off, it has no power afterwards to reinstate him, the direction in the section being absolute that, as the consequence of such an order, he shall for ever thereafter be disabled from practising as a solicitor.

Semble, where an appeal has been dismissed through the non-appearance of the appellant, the Court has no jurisdiction, on a subsequent application by the appellant, to enlarge the time for appealing.

APPEAL from an order of the Divisional Court dismissing a petition by John Henry Lamb to be reinstated on the roll of solicitors.

It appeared that on August 2, 1886, the Queen's Bench Division made an order under s. 32 of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73) striking the name of the appellant off the roll of solicitors for having allowed an unqualified person to practise

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in his name. Notice of appeal was given on August 21, 1886, and on November 3, 1886, the appeal duly appeared in the list for hearing, but on the same day, and shortly before the case was called on, the appellant, acting on the advice of counsel, determined not to proceed with his appeal, but to apply to the Divisional Court at some future time for reinstatement. Accordingly, upon the appeal being called on and the appellant not appearing, it was dismissed with costs. On July 27, 1887, the appellant applied to the Court of Appeal to have his appeal restored to the paper on the ground that when on November 3, 1886, he did not appear on his appeal he understood that after suffering a term of suspension he could apply to be reinstated on the roll, but the application was dismissed with costs. On April 12, 1888, an application by the appellant to the Divisional Court to be reinstated on the roll was dismissed. The appellant then, under the Solicitors Act, 1888 (51 & 52 Vict. c. 65), and the rules thereunder, presented a petition for reinstatement to the Master of the Rolls, who referred the petition to the Divisional Court, who on May 13, 1889, dismissed the petition with costs, being of opinion that it had no jurisdiction to restore a solicitor to the roll after he had been struck off under s. 32 of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73).

Waddy, Q.C., and *Crispe*, for the appellant. The question is whether, having regard to s. 32 of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73), permanent disability to practise is a necessary consequence of striking a solicitor off the rolls. Upon the true construction of the section there is a discretionary power in the Court to say whether the solicitor shall or shall not be permanently disabled from practising. The section directs that, if an offence (such as that in the present case) is proved against an attorney or solicitor, "then and in such case every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor." The Act previously in force, 22 Geo. 2, c. 46, was more stringent in its terms, for s. 11 provides that any attorney or solicitor allowing, as in the present case, an unqualified person to practise in his name,

"shall be struck off the rolls and for ever after disabled from practising as an attorney or solicitor." The object of inserting the words "and may" in the subsequent Act was to give the Court a discretion. "And may" should be read as "or may"; the latter Act modifying the obligatory effect of the former, so as to enable the Court in a case where the offence is not of the gravest character to apportion the punishment to the offence. *Re Grayston* (1) conflicts with the decision of the Divisional Court in this case, for there a solicitor who had committed a similar offence under s. 32 was only suspended from practice for two years. If the Court should be against the appellant on the construction of the statute, he applies for an extension of time for appealing from the original sentence.

R. T. Reid, Q.C., and *Hollams*, for the Incorporated Law Society were not called upon, but, in reply to the Court, said they were willing to treat the application as a motion to enlarge the time for appealing against the order of August 2, 1886, striking the appellant off the rolls.

COTTON, L.J. I think the first question to be dealt with is whether the application of the appellant, which we are enabled to deal with now by the concession of the respondents, the Incorporated Law Society, for leave to appeal against the order of August 2, 1886, striking him off the roll, ought to be granted.

I do not think any such leave, even if it could be given, ought to be granted in this case. The order was made on August 2, 1886, and on August 21 following the appellant gave notice of appeal. The appeal was in the paper for hearing on November 3, 1886, but upon its being called on upon that day the appellant, under the advice of counsel, did not appear, and thereupon an order was made dismissing the appeal. I doubt whether, under those circumstances, we could restore it. An effort was made on July 27, 1887, to revive the appeal, notwithstanding the order for its dismissal, but the application which was made for that purpose was dismissed. Then, again, nothing further was done until April 12, 1888, when an application made by the appellant to

(1) 4 T. L. R. 749.

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the Divisional Court to be reinstated on the roll was dismissed. Again, nothing further was done until the order now appealed from was made on the present petition. In my opinion we should be wrong, even if we could do so, to give the appellant the opportunity of a re-hearing by way of appeal against the original order of August 2, 1886. If he had intended to prosecute the appeal he certainly ought to have done so when it was presented; and even if it were within our power now to allow him to proceed with his appeal I do not think we ought to exercise that power when there has been this delay, and when the appellant has had ample opportunity of prosecuting his appeal. The Court ought to be strict to see that, when an order has been made, the time for appealing against that order is not extended indefinitely. Here a very long time has elapsed since the original order was made by the Queen's Bench Division striking the appellant off the rolls. In my opinion, therefore, we ought not to grant the leave which, by the concession of the respondents, has been applied for.

Now I come to consider the effect of the order of August 2, 1886, and the question of the construction of the statute. We have not to consider whether, when that order was made, the Court should have made a more lenient order, because the order has been made, not under the more lenient power contained in the statute 6 & 7 Vict. c. 73, but under the power contained in the 32nd section, and it absolutely directs that the appellant be struck off the rolls; and the question is, what is the consequence of that order. The words of the 32nd section are that, if it be found that any attorney or solicitor has so offended as there mentioned, he "shall and may be struck off the roll, and for ever after be disabled from practising as an attorney or solicitor." I assume that, when an application is made to strike a solicitor off the rolls, the Court has power, if it thinks fit, not to inflict so serious a punishment. That is my present impression, but I do not in any way decide the point. The Court has, however, in this case acted upon the extreme power which is given to it and has struck the solicitor off the rolls. Then what is the effect of that? The power given by the 32nd section is not a discretionary power—it is not that the judge or Court

shall or may by the order disqualify the solicitor from acting as a solicitor; but the section says that if he has been struck off the rolls he shall for ever after be disabled from acting as a solicitor. It is not a criminal sentence; but I think it means that, when an order is made striking the solicitor off the rolls, then he is for ever after disqualified from practising as a solicitor. It is not a case in which there is no statutory direction as to the consequence of striking a solicitor off the rolls. The statute contains an absolute direction, and we cannot go against the statute. It directs that he shall for ever after be disabled from practising as a solicitor. Even if there were, upon an application under the 32nd section, power for the Queen's Bench Division and for us to make any other order than that which was made in the present case, I think that here, the order having been made, we are prevented from directing that the Master of the Rolls shall reinstate the solicitor, because by the statute he is disqualified for ever after from practising as a solicitor.

I do not enter upon the question as to what is the proper course to be adopted when a solicitor seeks to be re-admitted, because, on the facts of this case, it is not in the power, in my opinion, of the Master of the Rolls to re-admit this gentleman as a solicitor after the sentence which has been passed upon him by the Queen's Bench Division. The consequence of such a sentence is that he is for ever after disqualified from acting as a solicitor.

FRY, L.J. With regard to the application which has been made for the enlargement of time to appeal, it does not appear to me to be competent for us to grant it, even if it were desirable and right, because an appeal has been lodged and has been dismissed. But, even if we had the power, I am convinced that in this case we ought not to exercise it. Not only was that appeal lodged and dismissed, but a subsequent application was made so long ago as July, 1887, with a view of reviving that appeal, and that has been refused. The matter has therefore been twice before a Court of competent jurisdiction.

With regard to the other point, it is to be borne in mind that the general jurisdiction under which the Court exercises its

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powers over solicitors is a general jurisdiction over them as officers of the Court. But in this case we are dealing, not with the general jurisdiction, but with an express statutory provision which provides that in every case in which an attorney or solicitor offends in the manner there pointed out, that is, by allowing an unqualified person to practise under the name of a qualified person, that attorney or solicitor shall be struck off the rolls, and every such attorney and solicitor, on being struck off the rolls, shall and may be for ever after disabled from practising as an attorney or solicitor. I shall not express any opinion whether those words "shall and may" are obligatory upon the Court, when the application to strike off is brought before it, or not. It may be that there is still a discretion reserved to the Court as to whether it will inflict a punishment on the solicitor short of striking him off the rolls; but, if the Court does strike a solicitor off the rolls, then it appears to me that the consequence which is stated by the statute follows, and that, upon being struck off, that solicitor is for ever after disabled from practising. I do not think the discretion is given to the Court that it may strike the solicitor off the rolls and yet protect him from for ever after being disabled from practising as a solicitor. I think it was intended by the legislature that permanent disability to practise should inevitably follow from an order striking a solicitor off the rolls. In this case, the solicitor having been struck off, in my opinion the statutory consequence follows.

LOPES, L.J. Sect. 32, it is to be remarked, gives a statutory jurisdiction, and therefore it must be strictly followed. To my mind the proper construction to be placed upon this statute is clear. It appears to me—and I do not hesitate to express an opinion to that effect—that the words "shall and may be struck off the rolls" do confer upon the Court to which the application is made discretionary power as to whether they will strike off the rolls or whether they will adopt some less severe punishment, such, for instance, as suspension. The words that follow are these, "and for ever after be disabled from practising as an attorney or solicitor." Now I think the only construction to be put upon that is this, that, directly the Court has determined that the

proper course to pursue is to strike the solicitor off the rolls, then it is an inevitable consequence of that striking off the rolls that he shall for ever after be disabled from practising as an attorney or as a solicitor. In this case the Court to whom application was made did strike the solicitor off the rolls. I think therefore it followed as a consequence that he was disabled from practising, and that we now have no jurisdiction to restore him.

That being the true construction of the statute, the only course left open to Mr. *Waddy* was to do that which he did, namely, to apply to us to enlarge the time for appealing. I doubt whether we have power—indeed, I think we have not power—to grant such an application in any case; but I am quite clear, even if we had such a power, that we ought not to exercise it in this case. It seems to me that, after the appeal was dismissed on November 3, 1887, there was no jurisdiction to enlarge the time; but beyond that we know that in July, 1887, an attempt was made to revive the appeal, which was refused. Under all these circumstances, I am of opinion that the appeal must be dismissed.

Solicitors: *L. W. Gregory; E. W. Williamson.*

G. I. F. C.

THE QUEEN *v.* VAILE AND OTHERS.

June 26.

Certiorari—Costs—Municipal Corporation—Certiorari to quash Orders of Town Council—Liability of individual Members of Council.

A rule having been made absolute for a certiorari against a municipal corporation to bring up and quash certain orders made by the town council for illegal payments out of the borough fund:—

Held, that members of the town council who had joined in making such orders were liable to be ordered, on a separate application against them, to pay the costs of the certiorari.

RULE calling on Lawrence William Vaile and others to shew cause why they should not pay to Edward Whiteley his costs of and incidental to applying for, obtaining, and making absolute a rule for a certiorari, and of bringing up and quashing the orders or resolutions therein referred to.

In an action brought against the town surveyor of the corpora-

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tion of Ramsgate for penalties under the Public Health Act, 1875, s. 193, he was held liable as being interested in certain contracts made with the corporation: *Whiteley* v. *Barley*. (1)

Certain orders or resolutions of the town council, of which the defendants were members, appointing the surveyor engineer to the corporation for the purpose of completing the drainage of the borough, with a commission; and for payment to him of certain sums on account of the commission, and a sum of 300*l.* for expenses of his defence to the action, were afterwards brought up by a writ of certiorari directed to the mayor, aldermen, and burgesses of the borough and were quashed: *Reg.* v. *Mayor, &c., of Ramsgate.* (2)

Dickens, shewed cause. The defendants, who are individual members of the town council, and were not parties to the rule for a certiorari and did not appear to shew cause, and could not tax the costs of it, are not liable to pay such costs. If they had appeared they would have had no locus standi. They might perhaps have been brought in by notice under the Crown Office Rule 259, but no such step was taken. The applicant relies on *Reg.* v. *Greene* (3), where a person who procured another to obtain a rule nisi for a quo warranto was ordered to pay the costs, but there the relator was in indigent circumstances and unable to pay costs, and was put forward to protect the real prosecutor.

Where orders for payment out of borough funds were brought up on certiorari and quashed "with costs to be paid by the prosecutors," the rule not further stating by whom the costs were to be paid, and no cause having been shewn, the Court refused to grant an attachment against certain individual members of the town council for non-payment, though the rule for an attachment was drawn up on reading their affidavits used in opposing the motion for a certiorari; Lord Denman, C.J., referred to the peculiar practice on the removal of orders by certiorari, and said the course was, that where the character of the person appearing in the situation of a prosecutor was not expressly defined the Court

(1) 21 Q. B. D. 154. (2) 23 Q. B. D. 66.
(3) 4 Q. B. 646.

should decide who should be deemed the prosecutor; not that the individual succeeding should call upon whom he pleased as liable in that capacity: *Reg.* v. *Dunn.* (1) The applicant in this case named the prosecutors, and the Court will not make persons who are not parties to the rule pay the costs: *Reg.* v. *Thomas & Philp* (2); *Reg.* v. *Dodson.* (3) A corporation even may appear at the expense of the rates: *Lewis* v. *Mayor and Corporation of Rochester* (4); *Reg.* v. *Mayor of Tamworth.* (5)

T. Willes Chitty, in support of the rule. The defendants are liable: *Reg.* v. *Dunn.* (6) In that case it was stated that the Court had in several instances ordered costs to be paid by the person who appeared on the affidavits to be liable. The corporation having no funds of its own is in the same position as an indigent relator. The mistake in *Reg.* v. *Dunn* (6) was to apply for an attachment when the application should have been for a rule nisi to the individuals to pay the costs. That course has been adopted in the present case. To obtain the costs against the persons making the affidavits, a special application must, no doubt, be made: *Norton* v. *Curtis.* (7)

LORD COLERIDGE, C.J. I am of opinion that the rule should be made absolute. Orders were made nominally by the town council, but, of course, really by individual members of it, for the payment of sums of money in respect of contracts which were illegal. These orders were brought under the consideration of the Court in an action for penalties, and were declared to be illegal, and the Court held that the penalties were recoverable. Thereupon many of the persons who had joined in making the orders for payment which were disallowed, ordered that the expenses incurred by the party liable to the penalties should be paid by the persons against whose interests those payments had been made, and who were in fact represented by the relator, viz., the ratepayers of the borough. That led to further proceedings, and those items in the rates being brought by certiorari before the Court were disallowed. The question now is who is to pay

(1) 5 Q. B. 959, at p. 964.
(2) 7 Ad. & E. 608.
(3) 9 Ad. & E. 704.
(4) 30 L. J. (N.S.) (C.P.) 169.
(5) 17 W. R. 231.
(6) 5 Q. B. 959.
(7) 3 Dowl. 245.

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the costs of all those proceedings which have been, according to the decision of the Court, illegal from the commencement. Clearly in justice and good sense those persons who initiated the proceedings, who made the orders declared to be illegal, who defended them, and persisted in expensive litigation, are responsible for those costs. It has been pointed out in argument that a corporation is the same as an indigent relator, because, although the corporation has, in one sense, money, yet it has not money of its own, but only of the ratepayers. The respondents have defended these orders with money taken out of the pockets of the ratepayers. The persons who have taken an entirely wrong view of the law, and persisted in litigation, and occasioned the cost ought to bear it.

FIELD, J. I am of the same opinion.

Rule absolute.

Solicitors for applicants: *Kingsford, Dorman, & Co.*
Solicitors for defendants: *Meredith, Roberts, & Mills.*

J R

Aug 8.

[IN THE COURT OF APPEAL.]

BRACKLEY *v.* THE VESTRY OF ST. MARY, BATTERSEA.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s* 73—57 *Geo.* 3, *c. xxix., s.* 65—*Power to seize Things placed on Footway or Carriageway without Conviction.*

The power given by the 65th section of 57 Geo. 3, c. xxix., to the authority having control of the pavements in districts within the Act, to seize wares, merchandize, and other matters placed on footways or carriageways and not removed, when required by the authority, is not dependent upon the existence of a conviction under that section, but may be exercised although there has not been such a conviction.

APPEAL from the judgment of Charles, J., at the trial without a jury.

The action was brought in respect of the seizure by the servants of the defendants of a handbarrow and certain goods thereon belonging to the plaintiff. The case for the defendants was that the barrow was being unlawfully used upon a highway

within the metropolis for the sale of goods; that the plaintiff had had notice to remove the same; and that, the barrow not being removed, the defendants were entitled to seize the same under the 65th section of 57 Geo. 3, c. xxix. (commonly called Michael Angelo Taylor's Act.) There had been no proceedings before magistrates for a penalty under that section. It was contended for the plaintiff that the section gave no right of seizing the goods to the defendants except as a consequence of a conviction of an offence under the section. (1)

(1) Points were taken with respect to the legality of the subsequent detention of the goods by the defendants having regard to what happened after the seizure, but, the only point upon which it has been thought necessary to report the case being as to the legality of the original seizure, the brief statement of fact contained above has been deemed sufficient.

The 65th section of 57 Geo. 3, c. xxix., is so lengthy that it has been thought unnecessary to set it out in full. So far as material, it provides in substance (inter alia) that, if any person shall place, or cause or permit to be placed, in or upon any of the carriage or footways in any streets or public places in any district within the jurisdiction of the Act any stall board, chopping block, show board, &c., wares, merchandize, or goods of any kind, or any coach, cart, wagon, dray, wheelbarrow, handbarrow, &c. (except coaches, &c., that have been licensed as hackney coaches, &c., and except for the necessary time of loading or unloading, taking up or setting down fares, &c.), and shall not immediately remove all or any of such matters or things, being thereunto required by any surveyor of pavements, or by any other person employed or appointed by the commissioners, trustees, or other persons having control of the pavements in the district, then the person so offending and the owner of such matters or things and the employer of the person so offending may be summoned before justices and convicted in a penalty; and also, that not only shall such penalties become payable, and to be recovered, but it shall and may be lawful to and for any person or persons appointed by the said commissioners, &c., *without any warrant or other authority than this Act*, to seize any such stall board, show board, &c., wares, merchandize, or goods, coach, cart, wagon, dray, wheelbarrow, handbarrow, &c., and in case any of the wares, goods, &c. so seized shall be perishable, or shall be articles of food, then the same shall be immediately forfeited, and such person who shall seize the same shall deliver the same to the overseers of the poor, and the same may be given to one or more of the poor inhabitants of the district; but otherwise such person shall cause the stall board, &c., goods, coach, &c., or any materials and things so seized to be removed to any place appointed for the reception thereof, if any such there be, and otherwise to such place as he shall judge convenient, giving notice of such place to the owner or other person interested, &c.; and the same shall be there kept and detained until such owner or other person interested shall cause to be paid the said penalty, together with the charges for taking or removing the same, &c.; and, in

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The learned judge gave judgment for the defendants as follows:—

CHARLES, J. In this case the plaintiff seeks to recover from the defendants a sum which it is agreed between the parties is to be 15*l.* by way of compensation for the seizure by the defendants of a handbarrow of the plaintiff, which upon the evening of July 14 last was in one of the public streets over which the defendants exercise supervision and control. The defendants justify the seizure of that handbarrow under the 65th section of 57 Geo. 3, c. xxix., and the question I have to decide is whether the language of that section authorized the defendants to seize the plaintiff's handbarrow, after having given the plaintiff notice to remove it from the street. In this case upon three occasions notice had been given to servants of the plaintiff that he must not keep the handbarrow in the street, and in particular a written notice was given by the street-keeper to the vestry on July 14 to one Tyler, who then had the handbarrow under his control. The contention on the part of the plaintiff is that this power of seizure is ancillary to the power which the section gives to the vestry to bring a person who disobeys a notice of that kind before a justice with a view to his being punished by having a penalty inflicted upon him; and I do not say that there are not words in the section which seem to point to such a construction of it, because the section does provide, in the first part of it, that, if a person disobeys a notice of the description here given, it shall or may be lawful for any justice of the peace, on complaint being made before him, to issue a summons requiring the person accused of such an offence to appear before him; and it is then provided that, if it be found that he has kept his barrow in the streets in defiance of the notice of the vestry, the justices may inflict a fine

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case the goods, &c., or other things so removed (not being perishable or articles of food) shall not be claimed, and the said penalty and charges be paid within five days, then that they may be sold by the commissioners, &c., and the overplus of the money arising from such sale shall be returned to the owner, after deducting the said penalty and the costs, charges, and expenses.

By the 25 & 26 Vict. c. 102, s. 73, the provisions of the above mentioned Act are, so far as the same is in force and is not inconsistent with the Metropolis Management Acts, to apply to the metropolis as defined by those Acts.

of 40*s.* for the first offence, and for the second and every subsequent offence a fine not exceeding 5*l.* Then there follows this clause: "And also not only shall such penalties become payable and be recovered, but it shall and may be lawful to and for any person or persons appointed or to be appointed by the commissioners or trustees or other persons as aforesaid for the purpose, without any warrant or other authority than this Act, to seize any such stall board, handbarrow, &c., and any materials upon it." I own that I feel the force of what has been contended on the part of the plaintiff, viz., that, if the defendants' contention is correct, then the result is that, before any judicial investigation has been made by anybody as to whether or not the owner of the property has been guilty of any offence pointed at by the Act of Parliament, the vestry may seize a person's property in the street. I must own that I should have been not unwilling to come to the opposite conclusion, but I think that the words of the section are too strong, and that it plainly gives an absolute authority to seize the handbarrow of a person who disobeys such a notice as was given in this case. On looking further into the section my view is strengthened by what follows with regard to what is to be done with goods of a perishable character. The provision with regard to such goods seems to me to indicate that the power to seize is not merely a power to seize in order to enforce a penalty that has been already imposed, but is a power to seize in order to remove obstructions from the streets. There is nothing in the preamble of the statute that helps me very much, but without this preamble it is obvious from the terms of s. 65 that the object of this provision is to keep the streets clear; and, having regard to the provision with regard to the disposal of goods that are perishable, I cannot come to the conclusion that the power to seize is limited as suggested by the plaintiff, and is merely a power to seize to enforce payment of a penalty which has been theretofore imposed. Then there are words in the latter part of the section which are relied upon by the plaintiff and to which I must not omit to refer. The section proceeds to provide with regard to what is to be done with the things if not perishable. In that case they are to be removed to some place named for the reception of them, and notice of such place is to be given to the

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owner of the goods, and the same are to be there kept and detained until such owner or other person interested therein shall cause to be paid "the said penalty together with all charges for taking or removing the same," &c. It is said that that indicates clearly that the seizure is not to take place until the penalty is imposed; for otherwise what would be the sense of saying that the goods are to be retained until "the penalty together with all charges" is paid? It seems to me that the true answer is that given by the defendants' counsel, viz. that the enactment with reference to the disposition of the goods must be read in connection with what has been done antecedently; and that the words must mean that the goods are to be detained until the owner shall cause to be paid the said penalty, if the vestry shall have thought fit to proceed to the enforcement of the penalty, or, if not, then until the charges of taking or removing the goods have been paid. In other words, that the goods are to be kept, if the vestry do not think fit to proceed for the penalty, until the charges are paid, and, if they have thought fit to proceed for the penalty, then until the penalty as well as the charges have been paid. Then the section uses further words which at first sight undoubtedly seem to be in the plaintiff's favour, for it directs that the overplus of the money arising from the sale of the goods shall be returned to the owner or owners, if he or they shall have given such notice as aforesaid, after deducting the said penalty and such costs, charges, and expenses as have been incurred; but there again I think that the words must mean after deducting in the one case the costs, charges, and expenses, and in the other case the penalty as well. I feel the force of what has been said with regard to its being a strong thing to put into the hands of the vestry power to seize before any judicial investigation has taken place, but I come to the conclusion that the language of the Act does give them such power, and the legislature must be taken to have assumed that they would not exercise it improperly. The judgment must therefore be for the defendants.

Against this decision the plaintiff appealed.

Lumley Smith, Q.C., and *H. Tindal Atkinson*, for the plaintiff.

The provisions of the section with regard to seizure of the articles mentioned are ancillary to the provision with regard to proceedings for a penalty, and are intended to give a summary mode of enforcing the penalty. That is shewn to be the case by the provisions with regard to the disposal of the articles when seized, e.g. the provision that, when the goods are sold, the overplus of the proceeds after deducting the penalty and costs, charges, and expenses is to be handed to the owner. It cannot have been intended to give the local authority an arbitrary power of seizing private property without any judicial investigation or decision.

Channell, Q.C., and *Earle*, for the defendants. The power to seize given by the section is quite independent of the power to take proceedings before the magistrates. The object of the section is the prevention of obstructions in the street, and it is clearly intended that the seizure of the article shall be while it is in the street forming an obstruction to the traffic. [They were stopped by the Court.]

LORD ESHER, M.R. It appears to me that the only judgment we need give is that the decision of Charles, J., was right for the reasons given by him.

LINDLEY, and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitor for plaintiff: *F. J. Perks.*
Solicitor for defendants: *W. W. Young.*

E. L.

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July 30;
Aug. 9.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL ON THE RELATION OF THE BYKER BRIDGE COMPANY *v.* THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY AND COUNTY OF NEWCASTLE-UPON-TYNE AND THE NORTH-EASTERN RAILWAY COMPANY.

Municipal Corporation—Contract by—Capacity to contract—Ultra Vires—Municipal Corporations Act, 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 140, 143, 144 *—Agreement to make Annual Payments for use of Bridge in Borough for Foot Passengers, how far valid—Borough Rates, Misapplication of—Surplus of Borough Fund.*

A municipal corporation, which was subject to the Municipal Corporations Act, 1882, and a Local Improvement Act, agreed with a railway company for the payment to the latter of certain annual sums during a period of fifteen years in consideration that they would throw open a bridge belonging to them within the borough for the use of foot passengers free of toll. The local Act authorized rates for certain purposes not including such a bridge as the agreement referred to, and contained a provision with regard to surpluses arising from such rates analogous to that of s. 143 of the Municipal Corporations Act, 1882. An action having been brought by the Attorney-General at the instance of relators against the corporation, claiming an injunction to restrain the defendants from making the said payments out of moneys derived from the rates and a declaration that the said agreement was ultra vires and void:—

Held, that the defendants were not entitled to apply money derived from the rates, or to make rates for the purpose of creating surpluses to be applied, to payments under the agreement, nor to bind by such agreement the application of surpluses which might arise in future years; but that the agreement was not illegal or void, and, inasmuch as surpluses might arise which might from time to time legally be applied by the direction of the town council for the time being to such agreement as being for the public benefit of the inhabitants and improvement of the borough, to such extent the agreement might have effect: and therefore that the plaintiff was entitled to a declaration in the action that the defendants were not entitled to pay any moneys which might become due under the agreement out of the borough fund, nor to make any borough or improvement rate for the purpose of such payments, with liberty reserved to the plaintiff to apply for an injunction subsequently, if the defendants manifested any intention of so misapplying their funds; but that such declaration was not to prevent the making of such payments out of any surplus there might be of the borough fund or improvement rates after applying the same to the purposes to which they were respectively legally applicable.

Sect. 140, sub-s. 4, of the Municipal Corporations Act, 1882, does not authorize payment out of the borough fund of a judgment given for a sum of money which was not legally payable out of such fund.

APPEAL from the judgment of Wills, J., at the trial without a jury.

The facts, so far as it is necessary to state them for the purposes of this report, were as follows. The action was brought on the relation of the Byker Bridge Company against the corporation of Newcastle and the North-Eastern Railway Company for an injunction to restrain the first named defendants from paying and the last named defendants from receiving moneys derived from rates for the purpose of certain annual payments under an agreement dated April 11, 1888, and also for a declaration that the said agreement was ultra vires and void. The corporation of Newcastle had on or about April 11, 1888, entered into an agreement with the North-Eastern Railway Company, by which they agreed to pay to the company an annual sum of 600*l.* for fifteen years, the first of such payments to be made in April, 1889, in consideration of the company's agreeing to throw open free of toll a certain footbridge belonging to the company across the Ouseburn Valley in the city of Newcastle for the use of foot passengers. The relators were a company incorporated by Act of Parliament, who had under the powers of their Act constructed a bridge across the said valley, and were empowered to take tolls for the use of the same by foot passengers. They were assessed to the rates made by the corporation of Newcastle in respect of their bridge, and alleged that traffic would be diverted from such bridge and their tolls diminished by the agreement before mentioned. It was further alleged on the part of the relators that the said agreement was not authorized by any Act of Parliament, and that the corporation had no funds available for the annual payments to be made under the agreement except funds derived from rates, and that they were not empowered by any special Act or by the Municipal Corporations Act, 1882, to expend the proceeds of the rates for the purpose of carrying out the said agreement; and that the corporation threatened and intended to make the payments to be made to the railway company by means of a rate or out of the city fund or other fund derived from rates.

The defendant corporation alleged, inter alia, that the agreement was authorized by their general powers as a corporation and by the provisions of the Municipal Corporations Act, 1882, and of their local Acts; and that they had a surplus of the city

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fund available for the annual payments to be made under the agreement, and that they were empowered by the said Acts to expend the proceeds of the rates and to make rates for the purpose of carrying out the said agreement.

The learned judge gave judgment for the defendants. (1)

Sir R. E. Webster, A.G., and *R. S. Wright*, for the plaintiff. The agreement entered into by the defendants is illegal and ultra vires. The purpose for which the contract is made is not one in respect of which the corporation can make a borough rate under the Municipal Corporations Act, 1882, s. 144. Assuming that it is a purpose to which a surplus of the borough fund would be applicable under s. 143 if it existed, the defendants are not entitled to contemplate that there will be a surplus in the future. It is clear that a corporation is not entitled to create a surplus by levying a rate larger than is necessary to make the borough fund sufficient for the purposes to which it is specifically applicable under the Act. A surplus is not to be anticipated, but is by s. 143 to be applicable, if and when it arises, under the direction of the town council for the time being for the public benefit of the inhabitants and improvement of the borough. This agreement is not conditional upon there being a surplus, but is an absolute agreement to pay a yearly sum. It affects to tie the hands of the town council in future, and would bind the surplus of future years, which cannot legally be done. There is no limit

(1) Sect. 140 of the Municipal Corporations Act, 1882, provides, (1) The borough fund shall be applicable to and charged with the several payments specified in the fifth schedule. (It was clear that these would not include the payments in question.) (3.) No other payment shall be made out of the borough fund, except (a.) under the authority of an Act of Parliament. . . . (4.) Saving, nevertheless, in relation to the application of the borough fund as authorized by this section, or otherwise by this Act, all rights, interests, and demands of all persons in or on the real or personal estate of the municipal corporation by virtue of any legal proceeding or of any mortgage or otherwise. Sect. 143 provides that, if the borough fund is more than sufficient for the purposes to which it is applicable under the Act or otherwise by law, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough. Sect. 144 gives power, if the borough fund is insufficient for the purposes to which it is applicable under the Act or otherwise by law, to make borough rates to meet the deficiency.

in the agreement to the obligation to pay, and therefore in its terms the agreement contemplates a contravention of the law and is consequently illegal and void: and the Court will grant an injunction to prevent its being carried out.

[BOWEN, L.J. Is it not necessary to this argument to shew that such an agreement as this is expressly or impliedly forbidden by the statute? An old municipal corporation has an existence at common law: and it may not follow, because a debt cannot lawfully be paid out of a certain fund, that therefore it cannot lawfully be incurred. See *Payne* v. *Mayor of Brecon.* (1)]

It is submitted that this agreement is illegal because it is an absolute contract to pay sums in the future, when there is not and cannot be any fund out of which the defendants can lawfully promise to pay. If the Court can see that there is no fund with respect to which the defendants can legally contract, it will grant an injunction without waiting until it becomes a question of the actual misapplication of a particular fund. The yearly sum contracted to be paid only becomes payable at the end of the year, and meanwhile the railway company will have taken no tolls on the bridge, and it might then in equity be too late for the relators to apply for an injunction against the application of the corporation funds to the payment. For this reason the Court will declare the agreement void and grant an injunction, where it is obvious that it contemplates an illegal application of the borough funds, and third parties are about to change their position on the faith of it.

[They cited *Attorney-General* v. *Aspinall.* (2)]

Dugdale, Q.C., and *W. Graham,* for the defendants, the corporation of Newcastle. In order to succeed in this action the relators must shew that the contract means that the corporation must illegally apply their funds. The contract merely is to pay certain sums of money and does not charge any particular fund. Both parties must be taken to have been aware of the provisions of the Municipal Corporations Act, and to have contracted subject and with reference to them. A municipal corporation still has

(1) 3 H. & N. 572. (2) 2 My. & Cr. 613.

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a common law capacity of contracting like any other person. The Municipal Corporations Act does not take that away, although it restricts the application of the corporate funds. This contract is not ultra vires, but for an object which is admitted to be for the public benefit of the inhabitants, and, if there is a surplus available, as there will be, the town council might then legally order its application to the payment provided for. There is no case made out for the application of the relators. The question is how far the relators are entitled to an injunction quia timent. The contract is neither illegal nor ultra vires. It is not shewn that there has been any misapplication of funds by the corporation, or that any such misapplication is threatened. Therefore the relators are not entitled to have the contract declared void, nor to an injunction.

[They cited *Reg.* v. *Mayor of Liverpool* (1); *Attorney-General* v. *Corporation of Thetford* (2); *Attorney-General* v. *Corporation of Blackburn.* (3)]

F. Dent, appeared for the railway company.

R. S. Wright, in reply. (4)

Cur. adv. vult.

(1) 28 L. T. 500.

(2) 8 W. R. 467; 2 L. T. 370.

(3) 57 L. T. (N.S.) 385.

(4) In the course of the argument there was considerable discussion with regard to the question whether there would or could be in future years any surplus of the borough fund applicable to the payments provided for by the contract. This question, which involved somewhat complicated accounts and calculations, depended to a great extent on the question whether the corporation were entitled to treat money raised by way of education rate under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), ss. 53, 54, as a separate fund for education purposes distinct from the borough rate in general, or whether the effect of the Elementary Education Act was not merely that education was rendered one of the purposes to which the borough rate was applicable, and therefore the borough fund must be applied to education expenses before any surplus could arise; in which case it was contended there would not be a surplus available for the payments provided for by the contract. As the Court pronounced no decision on this question, the argument so far as that point is concerned is omitted. It will also be seen from the judgment that various questions were raised with regard to the applicability of rates levied under the Local Improvement Acts to the payments to be made under the contract, but, as it has not been thought necessary to report the case so far as it turned on the construction of merely local statutes, the facts and arguments so far as they related to those statutes are not given.

Aug. 9. The judgment of the Court (Lord Esher, M.R., Lindley and Bowen, L.JJ.) was delivered by

LINDLEY, L.J. [The Lord Justice, after stating the object of the action and terms of the agreement, proceeded as follows]:—It has been decided that an action at law may be maintained against a municipal corporation upon a contract under its corporate seal, and that judgment in such an action may be recovered against the corporation, even although there may be no funds or other property properly applicable to satisfy the judgment: *Pallister* v. *Mayor of Gravesend* (1); *Payne* v. *Mayor of Brecon* (2); *Lewis* v. *Mayor of Rochester* (3); and see *Bush* v. *Martin.* (4) On the other hand it is clearly settled that a corporation will be restrained by injunction from misapplying its corporate property; and that a municipal corporation will be restrained from applying its borough fund to purposes not authorized by the Municipal Corporations Act or by some other Act of Parliament: *Attorney-General* v. *Aspinall* (5); *Attorney-General* v. *Mayor of Norwich.* (6) The same principle applies to other funds obtained under the provisions of other Acts of Parliament for purposes defined by those Acts; e.g. in this particular case to the funds raised under the provisions of the Newcastle Improvement Act, 1865.

It is necessary, therefore, to consider whether the 600*l.* a year which the corporation have agreed to pay can be properly paid out of the borough fund or out of its surplus or out of the moneys raiseable under the provisions of the Improvement Act, or out of any surplus of those moneys which may remain after the works authorized by that Act have been completed and paid for.

First, as to the borough fund. This is now regulated by ss. 139 & 140 and Sched. 5 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). The purposes to which this fund is applicable are enumerated in s. 140 and Sched. 5. Those purposes do not apply to the 600*l.* a year in question in this case unless the payment of it is warranted by some other Act of Parliament (see s. 140 (3) (*a*)), or unless it comes within the saving

(1) 9 C. B. 774.
(2) 3 H. & N. 572.
(3) 9 C. B. (N.S.) 401.
(4) 2 H. & C. 311.
(5) 2 My. & Cr. 613.
(6) 2 My. & Cr. 406.

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clause (s. 140 (4)). No other Act of Parliament is suggested; the Improvement Act, 1865, does not authorize any payment out of the borough fund; the payments to be made under the provisions of that Act are to be made out of the funds raiseable under the powers it confers. These will be considered presently.

The saving clause, s. 140 (4), does not confer rights, but saves them (see the judgment of Wood, V.C., on the corresponding clause in the former Act: *Arnold* v. *Mayor of Gravesend* (1)), and was probably inserted to save rights existing when the Act passed, and to prevent the negative words in s. 140 (3) from applying to the payment out of the borough fund of mortgages given or judgments recovered in respect of moneys or expenses authorized to be raised or incurred by the statute. We cannot construe this saving clause as authorizing the payment out of the borough fund of a judgment given for money not properly payable out of it. If the 600*l.* a year is not properly payable out of the borough fund in the absence of a judgment, it would be a judicial evasion of the Act to hold that a judgment for the same sum could be properly satisfied by payment out of the same fund. We are of opinion, therefore, that this 600*l.* a year cannot be properly paid out of the borough fund whether judgment for the money is recovered or not.

Next, as to the surplus of the borough fund. The disposition of this surplus, if any, is regulated by s. 143. That section is so worded as to authorize the council to pay the money in question out of the surplus, if any, if the council shall be of opinion that such application of the surplus is "for the public benefit of the inhabitants and improvement of the borough." To obtain for the inhabitants a free passage over a foot-bridge is an advantage which may be fairly considered to come within these words; and if in any year there is a surplus and the council think fit to apply such surplus in paying money due and payable under the contract, the council cannot be restrained from so applying such surplus.

But the council cannot be compelled so to apply the surplus. The council cannot in our opinion be bound by contract or otherwise to apply prospective surpluses in any particular way, and, if

(1) 2 K. & J. 574.

the contract before us did in terms purport to bind the council in this respect, or if effect could not be given to the contract without so binding the council, the contract would be null and void to that extent at least.

Equally clear is it that the power to make a borough rate under s. 144 cannot be properly exercised for the purpose of creating a surplus. The borough rate can only be made if the borough fund is insufficient for the purposes mentioned in s. 140 and can only be made to raise the amount estimated to be required to make the fund sufficient for such purposes. This is quite clear from the language of ss. 140, 143 and 144, and it is obvious that to hold otherwise would enable the council to make a borough rate for any purpose which they might think for the public benefit of the inhabitants and improvement of the borough. This is clearly not intended. Such a construction would render s. 143 (which deals with the surplus, if any) wholly useless. Whether there is or will be a surplus is a question on which we express no opinion. On the one hand it is alleged that there is and will be every year a large surplus. On the other hand it is alleged that this is only true if the money raised by what is called the education rate is treated as a separate fund for the payment of education expenses. It is contended that the borough fund ought to be applied in paying those expenses, and it is alleged that if this were done the supposed surplus would be nil. It does not appear to us necessary to decide this point, and we pass on to consider the Newcastle Improvement Acts, 1855 and 1865. No section of the Act of 1855 was referred to as material, nor can we find anything in that Act which authorizes the expenditure of the money in question.

The improvements authorized by the Act of 1865 are referred to in the preamble, but there is nothing there (nor, as we were informed, in the plans there referred to) which includes a foot-bridge over the Byker Valley. "Street," by the definition clause (s. 2), includes bridge but none of the sections relating to streets authorize an arrangement for procuring or making a bridge over the valley (ss. 22–60, and see especially ss. 35–38). In short, we can find nothing in this Act to justify the Court in holding that to make or procure a foot-bridge over the valley is

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Lindley, L. J.

authorized by the Act or by the previous Improvement Act, 1855; nor to justify the Court in holding that the 600*l.* a year in question is an expense of carrying those Acts, or either of them, into execution. It follows that neither the general rate mentioned in s. 128, nor the improvement rate mentioned in s. 129, can be made for the purpose of defraying this 600*l.* a year. The application of these rates is governed by ss. 148 and 149, and the surpluses of them, if any, may be applied for the improvement of the borough. But it is obvious that no rate can be properly made in order to obtain a surplus. The reasons already given for coming to this conclusion when examining the Municipal Corporations Act are applicable to the Improvement Act, and need not be repeated. It is true that the language of s. 149 is not quite the same as the language of the corresponding section of the Municipal Corporations Act, but the slight variation in language does not change the effect of the enactment. The conclusion on the whole matter, therefore, is that the contract in question is not illegal and void; for it is possible that the moneys payable under it may be properly paid out of the surpluses, if any, of the three following funds: viz. (1) the borough fund; (2) the moneys raised by the general rate authorized by the Improvement Act, 1865; (3) the moneys raised by the improvement rate authorized by the same Act. It is also possible that other moneys may be acquired by the corporation by gift, bequest, or otherwise, and be properly applicable to the payment of the 600*l.* a year contracted to be paid. Although the contract to pay this money is unconditional and unqualified, the contract ought to be treated as binding on the corporation so far as the corporation can legally bind itself to pay, but not further. The terms of the contract and the contention of the corporation tend to shew an intention to pay the money, regardless of the source from which the money is to be procured; but there is no clear proof that the corporation really intend to do this if the Court declares that such payment cannot lawfully be made.

No injunction, therefore, ought to be granted at present, but the Court ought to declare what can and cannot be done, and the plaintiffs ought to have liberty to apply for an injunction here-

after if the corporation should manifest an intention to misapply their funds.

Wills, J., dismissed the action with costs. For the reasons, however, already given, it will in our opinion be right to discharge this judgment, and to declare that the corporation are not entitled to pay any moneys which are or may become payable under the contract of April 11, 1888, out of the borough fund, nor to make any borough rate, nor any general or improvement rate, under the powers conferred on the corporation by the Municipal Corporations Act, 1882, and the Newcastle-upon-Tyne Improvement Act, 1865, respectively for the purpose of enabling the corporation to pay any such moneys; but the foregoing declaration is not to prevent the council or the corporation from paying such moneys out of any surplus which there may be of the borough fund or of the aforesaid rates after applying the same respectively to the purposes for which the same may respectively be made under the provisions of the aforesaid Acts; and reserve liberty to the plaintiff to apply for an injunction if necessary.

As regards costs, each party has contended for too much, and each should pay their own costs both of the action and of the appeal.

Appeal allowed.

Solicitors for the relators: *Stibbard, Gibson, & Wills, for Gibson, Pybus, & Pybus.*

Solicitors for the corporation: *Collyer-Bristow & Co., for Hill Motum.*

Solicitors for the railway company: *Williamson & Hill, for G. S. Gibb.*

E. L.

BENGAL SECRETARIAT LIBRARY

1889
May 21.

THE QUEEN *v.* HOWARD AND OTHERS, JUSTICES.

Licensing Acts—Licence—Renewal—Notice of Intention to oppose—Adjournment of Licensing Meeting—Jurisdiction to entertain Objection—Mandamus to Justices to hear and determine—Sufficiency of Return—35 & 36 *Vict. c.* 94, *s.* 42.

By the Licensing Act, 1872 (35 & 36 Vict, c. 94), s. 42, "Where a licensed person applies for a renewal of his licence . . . the justices shall not entertain any objection to the renewal of such licence . . . unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting . . . Provided that the licensing justices may, notwithstanding that no such notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard, and the objection considered, as if the notice hereinbefore prescribed had been given."

A licensed person applied at the general annual licensing sessions for a renewal of his licence. No notice of intention to oppose the renewal was given, but the licensing justices refused the application. A mandamus issued commanding the justices to hold an adjournment of the general annual licensing meeting, and to hear and determine the merits of the application or shew cause to the contrary. The justices returned that they had heard and determined the matter of the application:—

Held, on the argument of a point of law raised on the reply to the return, that the justices were not bound to grant the renewal at the adjourned meeting, but had jurisdiction to entertain the objection and refuse the application, and therefore the return was sufficient.

ARGUMENT of a point of law raised on the pleadings in answer to a return to a writ of mandamus, directed to Joshua Howard, Esq., and others, the licensing justices for the borough of Congleton, in the county of Chester, which recited the statutes 9 Geo. 4, c. 61, ss. 1, 13, and 35 & 36 Vict. c. 94, ss. 42, 74, and recited that the Court had been given to understand that at the general annual licensing sessions holden at Congleton on September 6, 1888, Frederick Moores, being then the holder of a licence for the sale of beer and spirits by retail on the premises known as the Horse and Jockey Inn, in the said borough, to be drunk or consumed on the premises, and being then a licensed person within the meaning of the said Acts, and Frederick Moores not having been required by the licensing justices to attend in person at the general annual licensing meeting, and not

having been served with any written notice of an intention to oppose the renewal of his licence, application was made on behalf of Frederick Moores for the renewal of his licence, and the application came on to be heard, and that the licensing justices were required on behalf of Frederick Moores to hear and determine the merits of the application, but wholly neglected and refused to hear and determine the application, and refused the same without hearing and determining the merits thereof, and had not at any time since heard and determined the same. The mandamus then commanded the licensing justices that within a reasonable time after receipt of the writ they should hold an adjournment of the general annual licensing meeting, and at such adjournment should proceed to hear and determine the merits of the application or shew cause to the contrary.

The return of the licensing justices stated that in obedience to the writ of mandamus they proceeded to hold an adjournment of the general annual licensing meeting of September 6, 1888, and appointed March 18, 1889, for the same, and caused due notice of the time and place of holding the adjournment to be served on Frederick Moores, as required by the statutes, and such adjournment was duly held as appointed, and it was proved on oath that the chief constable of the borough had pursuant to the statute duly served on Frederick Moores, not less than seven days before the adjournment, a written notice of his intention to oppose the renewal of the licence, and stating the following grounds of opposition, first, that the licensed house had remained closed to the public for several days before and after August 20 preceding; secondly, that the licensed house was not required for the convenience of the neighbourhood, and was unsuitable and insufficient for such purpose. And Frederick Moores being then present and the evidence of several witnesses with respect to the renewal of such licence being given on oath, the justices heard and determined the matter of the application of Frederick Moores as by the writ commanded.

Frederick Moores in reply said that:—

(1.) The licensing justices did not hear and determine the matter of the application pursuant to the statutes as by the writ of mandamus commanded by reason that having no jurisdiction

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to entertain any objection to the renewal of the licence, or to refuse to renew the same, they yet entertained objections thereto and refused to renew the licence.

(2.) The licensing justices had no jurisdiction to entertain the objections or to refuse to renew the licence by reason that

(1.) The written notice of an intention to oppose the renewal of the licence was not served on Frederick Moores not less than seven days before the commencement of the general annual licensing meeting.

(2.) No objection was made at the general annual licensing meeting, or otherwise, within the meaning of 35 & 36 Vict. c. 94, s. 42, and the licensing justices did not thereupon or at all adjourn the granting of the licence to a future day, and the adjournment of the general annual licensing meeting held on March 18 in alleged obedience to the writ of mandamus was not held pursuant to any objection made within the meaning of the Act.

(3.) The first ground of opposition alleged in the return, that the licensed house had remained closed to the public for several days before and after August 20 last was not a ground for refusing to renew the licence within the meaning of the statutes.

(4.) As to the second ground of opposition alleged in the return the renewal of the licence had already been refused by the licensing justices before their meeting held on March 18 on the said ground upon the application of Frederick Moores made at the general annual licensing meeting, and the said refusal was held by the Court to be invalid.

Rejoinder:—

(1.) Joinder of issue.

(2.) The said Joshua Howard and others will contend that they had jurisdiction to entertain any objection to the renewal of the licence and to refuse to renew the same upon the grounds stated.

Poland, Q.C. (*F. Marshall,* with him), for the prosecution. The return is bad. No written notice of intention to oppose the

renewal was served pursuant to 35 & 36 Vict. c. 94, s. 42, sub-s. 2. No objection having been made to the renewal at the first meeting, the justices had no jurisdiction to adjourn the hearing, but were bound to grant a renewal; *per* Lord Coleridge, C.J., in *Reg.* v. *Merthyr Tydvil.* (1)

James Paterson, (*A. G. M. McIntyre*, with him), for the justices, was called on. The judgments of Blackburn and Quain, JJ., in *Reg.* v. *Farquhar* (2), shew that there was power to adjourn under the proviso in 35 & 36 Vict. c. 94, s. 42, sub-s. 2. The mandamus in that case was granted on the ground that notice of the adjournment was given to the applicant, and the mandamus did not direct the justices to grant the renewal, but to hear and determine. In the present case the justices have heard and determined on the merits, which is what they were commanded to do. The passage referred to in the judgment of Lord Coleridge, C.J., in *Reg.* v. *Justices of Merthyr Tydvil* (1), contains nothing more than a suggestion. There is no expression of opinion, and the point was neither argued nor decided, for the decision turned on the ground that an objection made privately, out of court, was invalid.

Poland, Q.C., replied.

[The following cases were also referred to: *Reg.* v. *De Rutzen* (3); *Reg.* v. *Justices of Pirehill North* (4); *Sharpe* v. *Wakefield* (5).]

MATHEW, J. Our judgment must be for the justices, on the ground that they had jurisdiction to entertain the objection and refuse the renewal of the licence. Without due notice having been given, at the general annual licensing meeting, on objection being made, they determined not to grant the renewal. Thereupon a mandamus issued, commanding the justices to hold an adjourned session and hear and determine the application for a renewal. In obedience to the writ the justices held an adjourned meeting, and at the proper time before that meeting notice of the same objection, which had previously been irregularly given, was served, and the justices gave effect to the objection, and refused the application for renewal. It is argued on

(1) 14 Q. B. D. at p. 587.
(2) Law Rep. 9 Q. B. 258.
(3) 1 Q. B. D. 55.
(4) 13 Q. B. D. 696; 14 Q. B. D. 13.
(5) 21 Q. B. D. 66; 22 Q. B. D. 239.

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behalf of the prosecution that they were bound to grant the renewal, but *Reg.* v. *Farquhar* (1) is, in my opinion, a distinct authority for the contention on the part of the justices. The justices acted on 35 & 36 Vict. c. 94, s. 42. (2) If the section had stopped at the words "licensing meeting," in sub-s. 2, there would have been some ground for Mr. Poland's contention; but these words are followed by a proviso (3). In *Reg.* v. *Farquhar* (1) notice of the adjournment was given in open court, but knowledge of this was not brought home to the applicant, and therefore the Court held that he was entitled to a mandamus to hold an adjourned licensing meeting, and, after notice to him, to hear and determine his application. There, as here, no formal notice had been given; but the case is distinguishable, as is shewn by the judgment of Blackburn, J., who said: "This is a rule for a mandamus commanding the justices to hold an adjournment of the licensing meeting, and then to grant a renewal of Gardner's licence. It is clear we cannot grant a mandamus in that form. In the first place, the justices say the house was not duly qualified, not being, in their opinion, of the annual value of 11*l.*; and though a house has been previously licensed as a beer-house, yet if it is not of the real value now required, the holder of the licence would not be entitled to have it renewed, if the objection were properly raised and properly decided. The meaning of s. 42, par. 2, is obvious enough, the holder of a licence is to have notice before an objection to the renewal can be heard; but there might have been a failure to give the seven days'

(1) Law Rep. 9 Q. B. 258.

(2) "Where a licensed person applies for a renewal of his licence, the following provisions shall have effect:—

"(1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend.

"(2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting." "Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given."

notice, though the objection were good; in such case the justices may adjourn the granting of the licence to a future day, and require the attendance of the holder of the licence on such day when the case is to be heard and the objection considered, as if due notice had been given." (1) Here the justices have followed implicitly the directions given in *Reg.* v. *Farquhar.* (2) But Mr. Poland relies on *Reg.* v. *Justices of Merthyr Tydvil.* (3) In that case the objection was made out of Court, and in the absence of the applicant, and the Court held that this circumstance disabled the justices from acting upon it. No doubt Lord Coleridge, C.J., seems to have made a remark that, if no objection was made at the first meeting, the justices might find that they had no jurisdiction to adjourn, and were bound to grant a renewal; but the words are only "the justices may find," and his Lordship's judgment distinctly proceeded on the ground that the objection was taken out of Court, and A. L. Smith, J., concurred for the same reason.

Therefore, as *Reg.* v. *Farquhar* (1) is an authority binding on us, while the other case referred to can be distinguished, our judgment must be for the justices, with costs.

GRANTHAM, J., concurred.

Judgment for the justices.

Solicitors for both parties: *Stephens & Stephens.*

(1) Law Rep. 9 Q. B. at p. 261. (2) Law Rep. 9 Q. B. 258.
(3) 14 Q. B. D. 584.

P. B. H.

1889
July 3, 4;
Aug. 9.

[IN THE COURT OF APPEAL.]

JOHNSON *v.* LINDSAY.

Negligence—Master and Servant—Common Employment—Contractor and Sub-contractor.

Builders contracted with a landowner to build certain houses, the contract providing that the defendants, a firm of ironfounders (selected by the landowner's architect), should lay a fireproof roofing on the houses, for which the builders were to pay 213*l.*, and were also to provide scaffolding and other assistance. The defendants employed their own workmen. In the course of the work the plaintiff, one of the builders' workmen, was injured by the negligence of one of the defendants' workmen:—

Held, by Cotton and Lopes, L.JJ. (Fry, L.J., dissenting), that the defendants were sub-contractors under the builders; that they and their workmen must be taken to have been in the employment of the builders; that the man who caused the injury and the plaintiff were consequently under a common master and engaged in a common employment, and that the action could not be maintained.

By Fry, L.J., that the defendants were independent contractors; that, whether they were sub-contractors or not, their workmen were not in the service of the builders; that the man who caused the injury and the plaintiff were not under a common master, although they were engaged in a common employment, and therefore that the defendants were not exempt from liability to the plaintiff.

THIS action was brought to recover damages for an accident caused by the negligence of one of the defendants' workmen in allowing a bucket to fall on the plaintiff. The defendants pleaded that the plaintiff and the workman who was alleged to have caused the accident were engaged in a common service and employment, and that the defendants' servants were competent workmen, and therefore that the defendants were not liable for the plaintiff's injuries.

It appeared from the evidence that the plaintiff was in the service of Messrs. Higgs & Hill, contractors and builders, who had contracted to erect a block of artizans' dwellings in North Row, Park Lane. The contract, which was made with Mr. Burdon, the architect, acting on behalf of the landowner, contained a general provision that in order to carry out the works specified to be executed by other tradesmen, and for which provisional amounts were included in the estimates, the contractors were to allow free access to the premises and all reasonable facilities to

such tradesmen for carrying out the several works reserved for them to perform. It also contained a special provision that Higgs & Hill should provide a sum of 213*l.* to be paid to Lindsay & Co. (the defendants), or any other firm to be approved by the architect, for certain fireproof plate work to be laid complete, and were to allow the defendants the use of their scaffolding and to provide necessary attendants for the carrying out of their work, and to work with them, as might be necessary for the due dispatch of their work, which was to be done in accordance with specific instructions to be furnished by the architect.

Mr. Burdon also, on behalf of the landowner, obtained and approved an estimate from the defendants for the above-mentioned plate work, which was to form the roofing of the building, and this estimate was also sent to Higgs & Hill and approved by them. The defendants employed their own workmen in their part of the work, among whom was the workman who caused the accident.

The negligence complained of by the plaintiff consisted in the defendants' workman hooking the bucket to the hook of the chain by which it was suspended, instead of passing the chain round the handle of the bucket into the ring. The consequence was that the bucket became detached from the chain and fell on the plaintiff. It was admitted that the defendants had provided competent workmen and all needful appliances.

At the trial the jury found a verdict for the plaintiff with 52*l.* 10*s.* damages, and judgment was given for the plaintiff accordingly.

On May 8, 1889, a motion was made before Pollock, B., and Manisty, J., sitting as a Divisional Court, to set aside the verdict or to enter judgment for the defendants.

The learned judges held that the plaintiff and the defendants workman were in a common employment, and that the case was governed by *Wiggett* v. *Fox* (1), and they accordingly directed judgment to be entered for the defendants. The plaintiff appealed.

Guiry, (*Harris, Q.C.*, with him), for the plaintiff. The judgment of the Divisional Court was based on *Wiggett* v. *Fox* (1),

(1) 11 Ex. 832.

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which was treated as laying down the general rule that the servants of a sub-contractor are in the employment of the contractor; but that case is explained by *Abraham* v. *Reynolds* (1), from which it appears that in *Wiggett* v. *Fox* (2) the contractor paid the sub-contractor's workmen and had power to dismiss them, so there was a common employer—the contractor. The real ground on which the employer is exempt from liability to the workman for negligence of another workman is that the workman if he sees danger may decline the service, and that if he enters it he takes the risk of the negligence of his employer's other servants. In *Priestley* v. *Fowler* (3) the facts suggest that the foundation of the action was that the defendant knew of the defect, and the plaintiff did not. *Abraham* v. *Reynolds* (1) shews that employment by the same person is necessary. In *Warburton* v. *Great Western Ry. Co.* (4) it was laid down that in order to exempt the employer from liability there must be a common employment under the same employer. *Turner* v. *Great Eastern Ry. Co.* (5) proceeds on the same principle; the defendants did not pay the plaintiff and had no control over him, and the action was held maintainable. In *Wiggett* v. *Fox* (2) the defendants paid the plaintiff, and were entitled to dismiss him. In *Rourke* v. *White Moss Colliery Co.* (6) *Wiggett* v. *Fox* is doubted as not proceeding on a right view of the facts. In *Hall* v. *Johnson* (7) Erle, C.J., states the rule to be that a servant when he engages to serve a master undertakes as between himself and his master to run all the ordinary risks of the service, including negligence on the part of a fellow servant when he is acting in the discharge of his duty as servant of him who is the common master of both. Here the plaintiff was employed by Higgs & Hill, and the person whose negligence caused the accident was employed by the defendants, and not by Higgs & Hill, so the action is maintainable.

Kemp, Q.C., and *Poulter*, for the defendants. The building owner contracted with Higgs & Hill and had nothing to do with

(1) 5 H. & N. 143.
(2) 11 Ex. 832.
(3) 3 M. & W. 1.
(4) Law Rep. 2 Ex. 30.
(5) 33 L. T. 431.
(6) 2 C. P. D. 205, 208
(7) 3 H. & C. 589.

the defendants. All the workmen are engaged in a common employment. The case is governed by *Wiggett* v. *Fox* (1), which has been followed up to the present time.

[FRY, L.J. It is there said that the servants of the sub-contractor are servants of the contractor. Can you reverse this and say that the servants of the contractor are servants of the sub-contractor? That appears to me what you are endeavouring to do.]

The workman whose negligence caused the accident and the plaintiff were both servants of the contractor. They had therefore a common master and were engaged in a common employment: *Rourke* v. *White Moss Colliery Co.* (2)

Guiry, in reply, referred to *Maguire* v. *Russell.* (3)

Cur. adv. vult.

1889. Aug. 9. LOPES, L.J., delivered the judgment of himself and Cotton, L.J., as follows:—

The plaintiff in this case was employed by Higgs & Hill: the man whose negligence caused the injury to the plaintiff was directly employed by the defendants. The question to be determined is whether the plaintiff has a cause of action against the defendants as the masters of the man who caused the injury. This entirely depends on the relative position of the injuring and injured man.

Higgs & Hill had contracted for the whole work of improving and altering certain dwelling-houses under the supervision of an architect. A certain portion of this work was of a special and definite kind, which was to be done under a special clause in Higgs & Hill's contract. The architect was to select the person to do this work. Higgs & Hill were to allow the person so selected the use of their scaffolding and were to provide them with any needful attendants for the carrying out of the work, and to work with them as might be necessary for the due despatch of their work.

The work was to be carried out in accordance with a specifi-

(1) 11 Ex. 832. (2) 2 C. P. D. 205.
(3) 12 Sc. Sess. Cas. 1071.

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Lopes, L.J.

cation and instruction to be forwarded by the architect to Higgs & Hill.

The architect selected the defendants, and obtained an estimate for the work from them for 213*l.*, which was duly forwarded to Higgs & Hill. This sum was included in the contract of Higgs & Hill and was to be paid by them. It was admitted that the man who caused the injury had been selected with reasonable care, and that all the materials and resources were adequate and proper. In these circumstances we are of opinion the defendants became sub-contractors under Higgs & Hill and were, together with the men directly employed by them, in the employment and under the general control of Higgs & Hill, working together for one common object, i.e. the carrying out of Higgs & Hill's contract, and taking upon themselves all the risks naturally incident to the work they had undertaken. Higgs & Hill were the common masters of the injuring and injured men, both were in their employment, and both were engaged at the time of the injury in performing a joint operation included in Higgs & Hill's contract, and for which Higgs & Hill were to receive payment, and both, the one directly, and the other indirectly, were paid by them.

This case comes within the decision of *Wiggett* v. *Fox.* (1) In that case the defendants had contracted with the Crystal Palace Company to erect two towers. They themselves supplied materials, scaffolding, and tools, but engaged one Moss as a piece worker, who employed Wiggett and others as workmen under him. Whilst Wiggett was engaged at his work, one of Fox & Co.'s own workmen let fall a heavy tool from the top of one of the towers, and killed him. It was held that Fox & Co. were not liable. Alderson, B., said: "Here both the servants were at the time of the injury engaged in doing the common work of the contractors, the defendants, and we think that the sub-contractor and all his servants must be considered as being for this purpose the servants of the defendants whilst engaged in doing work, each devoting his attention to the work necessary for the completion of the whole, and working together for that purpose;" and again, further on in his judgment, he says: "If we were to

(1) 11 Ex. 832.

hold the defendants liable we should be obliged to hold that every contractor, where various tradesmen, bricklayers, plumbers, and the like, are employed to build a house, would be liable for all accidents inter se to the various workmen so employed in the common object, and it is difficult to see that it could stop there — possibly the common employer of them all might be made liable in such cases." The case of *Wiggett* v. *Fox* (1) is the inverse of the present case, but appears to us to involve the same principle. It has never been overruled, but has been commented on by Channell, B., and Martin, B., in *Abraham* v. *Reynolds* (2). The defendants in that case were cotton brokers, and the plaintiff was the servant of Jump & Son, who had contracted to do all the defendants' carting. The plaintiff was sent by Jump & Son with a lorry to fetch cotton for the defendants from the warehouse of a third person. The cotton was lowered by the defendants' servants into the lorry, and there received by the plaintiff. Owing to their negligence a bale fell upon and injured him. It was held by the Court of Exchequer, that as he was not under the control of the defendants, he was entitled to recover damages from them, although he was engaged in a common operation with their servants. It is to be observed that it is not and could not be suggested that the defendants were the common masters of the injuring and injured men, nor were they both in any sense paid by the defendants; the work was joint, but the employment different. Channell, B., and Martin, B., say they assented to the judgment in *Wiggett* v. *Fox* (1), because they thought Fox & Co. had control over Wiggett. Having regard to the facts of the case which they were deciding, we think they must have meant because they thought the relation of master and servant existed between Wiggett and Fox & Co. There is therefore a material distinction between the case of *Abraham* v. *Reynolds* (2) and the present case.

We know of no case where it has been held that a man is liable for an injury caused by his servant when the man doing the injury and the injured man are to be considered as employed in the work of another, who is the common master of both.

The principle of common employment has been carried much

(1) 11 Ex. 832. (2) 5 H. & N. 143.

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further in a recent Scotch case, *Woodhead* v. *Gartness, &c., Co.* (1), where it was held that all persons engaged upon the same work, whether in the same service or not, had taken the risks of the work upon themselves, and had no remedy for anything but the personal negligence of those co-operating in the work. The English authorities do not go so far as this, and for the purpose of the present case it is unnecessary to go so far, as we think there was not only co-operation in the work, but a common master and a common employment. The appeal must be dismissed.

FRY, L.J. I regret that I am not able to concur in the judgment of my learned Brethren, and as the question is one of considerable importance I think it is right for me to state my reasons for coming to a different conclusion. The first question is, were Lindsay & Co. sub-contractors to Higgs & Hill? I answer that they were not. The facts are as follows: Mr. Burdon, the architect, who was superintending the erection of the building, obtained an estimate from the defendants, Lindsay & Co., who were ironfounders, of the cost of constructing and fitting fire-proof plate work for the roof of the building. Mr. Burdon afterwards entered into a contract with Higgs & Hill for the erection of the building. That contract nowhere provided that Higgs & Hill should do the whole of the work intended to be done, nor that they should do this particular work, but only that they should provide money to pay Lindsay & Co., or the firm approved, to do the fire-proof plate work. It contained the two following provisions. [The Lord Justice read the two provisions set forth previously.] When the building was ready for the flooring to be laid, the architect communicated with Lindsay & Co., and they proceeded to do the work. In my opinion, Lindsay & Co. were independent contractors for this part of the work.

But even supposing Lindsay & Co. were sub-contractors, the further question arises whether there was any control over their work or their men in Higgs & Hill. The burden of proving that there was any such control rests upon the defendants in this case, but there is no evidence to shew that Higgs & Hill had any

(1) 4 Sc. Sess. Cas. 469.

right to control the execution of this part of the work, there was nothing to shew that they had any power to dismiss or direct the men, or that they were under any liability to pay them, and the probabilities of the case are very strong against this. Whether Lindsay & Co. were sub-contractors or not, they had undertaken to do this work and they were responsible for doing it rightly. They were specialists, and employed their own skilled men. The notion that such specialists would submit to the control of a firm of general builders is not one that commends itself to my mind. I come to the conclusion that there was no control in Higgs & Hill over Lindsay & Co.'s work or over their men, even if they were sub-contractors.

In considering the law applicable to these cases I am bound to admit that I feel considerable difficulty. There are cases which are binding on this Court which lay down certain principles of law with sufficient clearness: and on the other hand there are other cases that seem to lay down principles which if fully developed would be inconsistent with the principles by which I consider myself bound. The case of *Wiggett* v. *Fox* (1), as explained by *Abraham* v. *Reynolds* (2); *Rourke* v. *White Moss Colliery Company* (3), and *Swainson* v. *North Eastern Railway Company* (4) proceeded on this, that the control of the principal employer over the work or the wrongdoer is the test to apply in ascertaining whether the master is liable or not. In *Abraham* v. *Reynolds* (5) Martin, B., says: "I assented to the judgment for the defendants in *Wiggett* v. *Fox* (1) upon the ground that the position of the parties was ascertained by the test stated by my brother Crompton in *Sadler* v. *Henlock* (6), viz., whether the defendants retained the power of controlling the work;" and Channell, B., says: "There it was proved that the defendants had a control over and power to dismiss *Wiggett*, though engaged by the contractors." In *Rourke* v. *White Moss Colliery Company* (3) Cockburn, C.J., expressed his view that *Wiggett* v. *Fox* (1) could only be maintained on that principle. He said (at p. 208): "It is quite unnecessary to say whether the

(1) 11 Ex. 832.
(2) 5 H. & N. 143.
(3) 2 C. P. D. 205.
(4) 3 Ex. D. 341.
(5) 5 H. & N. at p. 147.
(6) 4 E. & B. 570.

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case of *Wiggett* v. *Fox* (1), which was relied on by the defendants, was rightly decided. My own view is that it was not; though I might agree with the decision if I could come to the conclusion that the facts were what Baron Channell appears to have thought they were in the explanation he gives of that case in *Abrahams* v. *Reynolds*. (2) But I cannot agree that the facts were as the learned Baron states them. It is, however, unnecessary to express any decided opinion on that case, because it does not apply to the present, the facts being different." And in *Swainson* v. *North Eastern Railway Company* (3), which was a decision of this Court, and therefore binding on us, two of the Lords Justices took the same view. I come therefore to the conclusion that in the present case where there was no control over the work or men by one master the defence of common employment could not be maintained. But the case of *Warburton* v. *Great Western Railway Company* (4) and *Swainson* v. *North Eastern Railway Company* (3) establish the further principle that in order that the master should escape liability there must be not only common employment, but a common master. In *Warburton* v. *Great Western Railway Company* (4) Kelly, C.B., referring to the recent authorities says: "The principle, or rather the proposition, of law established by these cases is that where two or more persons are the servants of one master and engaged in one common employment the master is not liable to an action for any injury sustained by one servant by reason of the negligence of another in the work or employment which is common to both or incidental to the carrying on of the general business or the operations in which the one and the other are engaged." In *Swainson* v. *North Eastern Railway Company* (3) that view was not only adopted by the Divisional Court, but was also adopted by the learned judges of this Court. Lord Bramwell said: "It is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury." And Lord Esher said: "I think that the authorities bear out the proposition laid down in the Exchequer Division—that in order to give rise to the exemption there must be a common employ-

(1) 11 Ex. 832.
(2) 5 H. & N 149.
(3) 3 Ex. D. at p. 348.
(4) Law Rep. 2 Ex. 30.

ment and a common master." In this case I think that if there was a common employment there was no common master.

Then there is another thing to be considered. The thought runs through all these cases that as between the plaintiff and defendant the risk was part of the consideration for the wages the plaintiff received. In *Warburton* v. *Great Western Railway Company* (1) Kelly, C.B., says (2): "And the ground upon which these decisions have been pronounced is that it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant under the same master and in the same employment, and that such risk is part of the consideration for the wages which he is entitled to receive." The principle therefore does not seem to me to apply in favour of a man who has never paid or contracted to pay any wages to the plaintiff. I think this is the first case in which the doctrine of common employment has been applied to a sub-contractor. In all other reported cases the defendant has been the principal contractor. In the present case the defendants stand in no contractual relation to the plaintiff. Therefore on the facts, as I understand them, and on the authorities, which are binding upon us, I differ from the other Lords Justices. But I feel at liberty to go further, and to say that I have great difficulty in understanding the grounds of some of the decisions. I do not understand what are the relations between the contract entered into by the employer and his liability for accident.

The case of *Merry* v. *Wilson* (3) seems to approach the matter from a different side, and if that were the only authority to be considered I should probably have concurred with my learned Brethren. If I approached the subject from that side I should say that negligence is default in performing some duty to take care; that the duty of a master to the general public is to take care that they are not injured by himself or his men; and that the duty of a master to those in his employment in any given work which the master does not personally execute is to select competent workmen and to furnish them with adequate materials and resources, and that if he did that he had adequately discharged

(1) Law Rep. 2 Ex. 30. (2) Law Rep. 2 Ex. at p. 33.
(3) Law Rep. 1 H. L., Sc. 326.

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his duty. But what is the duty of a master who does not personally execute the work towards a workman not in his employ, but who, as the servant of another master, is to take part in the common enterprise? I know of no authority which answers that question. But I find that in *Merry* v. *Wilson* (1) Lord Cairns has indicated a difference between the duty of a master to the general public and to a servant. In the case of the workman there is the element of free will; in the public there is not. Lord Cairns says (at p. 332): "At all events a servant may choose for himself between serving a master who does, and one who does not, attend in person to his business." So a man may choose between taking part in an enterprise in which there is the co-operation of masters who employ servants and not taking part in such enterprise. If he do voluntarily take part in such an enterprise he cannot complain of the master who does all he can, who chooses competent servants, and supplies them with fitting materials and appliances. This view would have presented itself to me if there had been no decisions before me but *Merry* v. *Wilson* (1). But it is, so far as I know, to be found in no other authority, and it is obvious that to adopt it would have far-reaching consequences, and would, I think, overrule some old cases, such as *Bland* v. *Ross*. (2) I do not therefore feel at liberty to adopt it.

Appeal dismissed.

Solicitors for plaintiff: *Langlois & Biden.*
Solicitor for defendant: *G. H. Finch.*

(1) Law Rep. 1 H. L., Sc. 326. (2) 14 Moore, P. C. 210.

M. W.

[IN THE COURT OF APPEAL.]

1889
June 25.

HAGGIN *v.* COMPTOIR D'ESCOMPTE DE PARIS.
MASON AND BARRY *v.* THE SAME.

Practice—Service of Writ—Foreign Corporation carrying on Business in England—Order IX., r. 8.

A foreign corporation carrying on business in this country is liable to be sued in an English court, and may be served in the same manner as an English corporation aggregate. Therefore service of a writ of summons on the head officer at the place of business in England of such a foreign corporation is good service on the corporation under Order IX., r. 8.

Newby v. *Van Oppen* (Law Rep. 7 Q. B. 293) followed.

APPEAL against an order of the Divisional Court (Field and Cave, JJ.) refusing to set aside the service of the writs in the above actions.

The defendants were a French corporation incorporated by French statutes and carrying on business in France, but having a branch office in London. The corporation carried on banking, discount, and other financial operations in France and other countries. The manager of the branch bank in London held a power of attorney from the corporation which authorized him to manage and direct the agency of the corporation in London, to discount and purchase drafts upon Europe and other specified places, and to transact other business connected with banking and discount operations, and to do various other acts; but it did not authorize him to transact all the operations undertaken by the corporation, and in particular it did not authorize him to give guarantees.

The above actions were brought against the corporation on two guarantees given by the corporation in Paris to the respective plaintiffs on behalf of the Société Industriale des Métaux, which was also a French company.

The writs were served on the manager of the defendants' branch office in London. The defendants took out a summons in each action to set aside the service as irregular, and the judge in Chambers, and Field and Cave, JJ., sitting as a Divisional Court, held the service in each case to be regular.

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(1.) In *Haggin* v. *Comptoir d'Escompte*

Bigham, Q.C., and *Tindal Atkinson*, for the defendants. The question turns upon the construction of Order IX., r. 8, of the Rules of the Supreme Court, 1883 (1), which is founded on s. 16 of the Common Law Procedure Act, 1852. The defendants contend in the first place that foreign corporations cannot be sued at all in the English courts unless they voluntarily submit to their jurisdiction. Such corporations are domiciled abroad, and all English statutes and rules of procedure must be read as having no reference to them. But in the second place, supposing that foreign corporations can be sued, they cannot be served under this rule. A "corporation aggregate" is a term of English law and does not apply to a foreign corporation. The defendants have no residence in England. If they can be served with a writ at all, it must be done under another rule, namely, Order XI., for serving defendants out of the jurisdiction. Their branch office is a mere agency office, and the clerk there is not the head officer nor the clerk of the corporation within the meaning of the rule, but merely a servant, who has only limited powers of doing the business of the corporation: *Ingate* v. *Austrian Lloyds* (2); *Nutter* v. *Messageries Maritimes* (3); *Mackereth* v. *Glasgow and South Western Banking Co.* (4); *Westman* v. *Aktiebolaget* (5); *Jones* v. *Scottish Accident Insurance Co.* (6); *Lhoneux* v. *Hong Kong Corporation.* (7)

Newby v. *Van Oppen* (8) is distinguishable because the officer who was served in that case had all the powers of the corporation, and was not merely an agent for a particular branch of business, as in the present case. That case was not a decision of the Court of Appeal, and is not binding on this Court.

Cohen, Q.C., and *J. Walton*, for the plaintiff, were not heard.

The appeal in *Mason and Barry* v. *Comptoir d'Escompte de Paris*

(1) Order IX., r. 8: "In the absence of any statutory provision regulating service of process every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation."

(2) 4 C. B. (N.S.) 704.
(3) 54 L. J. (Q.B.) 527.
(4) Law Rep. 8 Ex. 149.
(5) 1 Ex. D. 240.
(6) 17 Q. B. D. 421.
(7) 33 Ch. D. 446.
(8) Law Rep. 7 Q. B. 293.

not argued, as the counsel for the defendants admitted that
ıust be governed by the decision in the first appeal.
igham, Q.C., and *Tindal Atkinson*, appeared for the defendants.
inlay, Q.C., and *F. W. Hollams*, for the plaintiffs.

OTTON, L.J. This is an appeal against the refusal by a
isional Court to set aside a writ which has been served on an
er in London of the defendant corporation. The defendant
oration is established by French law, having its chief place
usiness for carrying on its banking and other operations in
s. It has established in London an office on the door of
h the name of the company appears, and on their bills and
ıorandums used in London the same name is printed. In the
actions which have been brought, money claims are made
nst the corporation, and writs have been issued for service
in the jurisdiction, and have been served on the defendants'
er in London, and it is now sought to set aside that service.
persons who represent the corporation in London certainly
y on the principal part of the business, namely, banking,
they carry it on in this country. The question whether
writs have been rightly served depends on the 8th rule of
er IX., which follows the terms of sect. 16 of the Common Law
edure Act, 1852, with the exception that this rule is prefaced
ıe words "in the absence of any statutory provision regulating
ce of process."
ıe first objection made is that this rule does not apply to
gn corporations at all. The doubt arises from the ambiguity
e expression "foreign corporation." If it means a corporation
lished abroad by foreign law, I do not agree with the objec-
; if it means a corporation which is not carrying on business
has no residence in England, I agree with it. Why should
the rule apply to a corporation established by foreign law
h has a residence in England? I agree that the exception
d not apply to foreign corporations, but that does not shew
the rest of the rule applies only to English corporations.
s said, and no doubt it is true, that "corporation aggregate"
term of English law, but if we find a foreign corporation
h comes within the description, I think the mere use of a

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technical expression as a term of art will not prevent such a corporation from coming within the rule. I see nothing in the rule which shews that it is not applicable to foreign corporations; and in my opinion it would be wrong to say that the rule does not apply to foreign corporations, that is, corporations established by foreign law, which are carrying on business, and therefore are resident, in England, and are submitting themselves to the laws of this country. The question, therefore, comes to this. Is this corporation resident in this country? I think it is. The principal part of its business is carried on at the office in London, and I think that when a foreign corporation, established by foreign law, sets up an office in England and carries on one of the principal parts of its business here, it ought to be considered as resident in England, and be treated as if it were established by English law. In my opinion that is the law, independently of all decisions; but the case of *Newby* v. *Van Oppen* (1) is an authority for that view. That case was decided under the corresponding section of the Common Law Procedure Act, and has never been questioned. Although distinctions have been made between it and some modern cases, yet the law there laid down has never been substantially dissented from. What was said in that case by Blackburn, J., comes to this, that if a corporation established by foreign law carries on business here, it must be considered as resident in this country, and must be equally liable to service as if it was established here. This is what he says, "The clerk or officer must be in the nature of a head officer whose knowledge would be that of the corporation." If he were only a clerk and performing a merely ministerial office instead of carrying on substantial business of the corporation, service on him would not be service on the corporation within sect. 16 of the Act, nor within the 8th rule of Order IX.; but that case lays down, as I think rightly, that when the foreign corporation is substantially carrying on their business at an office in this country, it must be considered as resident here, and liable to be served with writs in the English courts. Then we have the case before Bacon, V.C., *Lhoneux* v. *Hong Kong Corporation* (2), which was decided on the same principle. Now,

(1) Law Rep. 7 Q. B. 293. (2) 33 Ch. D. 446.

what are the cases against this principle? The case of *Ingate* v. *Austrian Lloyds* (1) has been referred to; but the corporation in that case was in no sense resident here. It had no office here, and the question did not arise under s. 16, but was whether ss. 18 and 19, which relate to service of process upon persons residing out of the jurisdiction, referred to foreign corporations. It is true that Cockburn, C.J., did say that sect. 16 did not refer to foreign corporations, but that was not the question before the Court. What he said is this: "The 16th section clearly applies only to corporate bodies in this country. All the preceding sections relate exclusively to persons resident within the jurisdiction. The 18th and 19th sections relate to British subjects and foreigners resident in foreign parts." That was a very different question from that before us, and that case is no authority adverse to *Newby* v. *Van Oppen*. (2) There was another case, *Nutter* v. *Messageries Maritimes* (3), where Lord Coleridge used some expressions which appear inconsistent with the view which we take in this case. But there the foreign corporation had offices in Paris and no office in London, but merely an agent. What Lord Coleridge said is really against the contention of the appellants. He says: "It is a condition precedent to a good service that the corporation must either have a domicil in this country or a distinct place where the business of the corporation is carried on by a person answering to this description. The service must be upon one single officer or clerk of the corporation," and he points out that in the case before him the corporation could not be said to be carrying on business or to have an office here. He also says further on, "The judgment of Lord St. Leonards, with which as regards the law the House of Lords agreed, though they differed from him as to his view of the facts, in the case of *Carron Iron Co.* v. *Maclaren* (4), was that the corporation in question could be sued on the ground that in respect of the place of business in this country they had a domicil in England." And A. L. Smith, J., says: "The case of the *Carron Iron Co.* v. *Maclaren* (4) does not affect this case, as the service there was held to be good on the ground that the defendants had

(1) 4 C. B. (N.S.) 704.
(2) Law Rep. 7 Q. B. 293.
(3) 54 L. J. (Q.B.) 527.
(4) 5 H. L. C. 416.

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practically a head office in this country for carrying on business here." Then again, *Mackreth* v. *Glasgow and South-Western Ry. Co.* (1) was a different case, because there the clerk who was served was not a principal clerk but only a subordinate clerk with very limited duties. None of these cases in any way vary the construction which I have put upon the rule. The appeal therefore fails.

FRY, L.J. I am of the same opinion. It is not necessary to refer to the earlier authorities, because in *Carron Iron Co.* v. *Maclaren* (2), which was decided in 1855, Lord St. Leonards in the House of Lords laid down that a corporation might have two domicils, and be subject to two jurisdictions. It is true that the other learned Lords differed from Lord St. Leonards on the facts of the case, but they did not dissent from the principle of law which he laid down. That principle appears to me to have been followed in subsequent cases. I think the present case is really controlled by *Newby* v. *Van Oppen* (3), and that we cannot determine it in favour of the defendants without overruling that authority. Mr. Bigham has suggested various slight differences, but the cases are substantially the same, because the foreign corporation in this case as well as in that was managing a business in this country, and actually had a place of business here. *Newby* v. *Von Oppen* (3) was decided in 1872. It has never been adversely commented on, and has been cited with approval in numerous cases, and has in fact determined the practice in chambers. Then the Judicature Act was passed, and it was thought right in 1883 to repeal the Common Law Procedure Act of 1852, and to embody the provisions of that Act in General Rules of Court. Sect. 16 of that Act was substantially re-enacted in the same words in Order IX., r. 8, without any indication that it was intended to alter the construction which had been put upon it eleven years before. From 1883 to the present time a considerable period has again elapsed, and I think that the course of procedure founded on that decision ought not now to be interfered with. But independently of that consideration I think

(1) Law Rep. 8 Ex. 149. (2) 5 H. L. C. 416.
(3) Law Rep. 7 Q. B. 293.

the construction put upon the Common Law Procedure Act in that case was reasonable and proper. It is obvious that if we allow a foreign corporation to sue without the liability to be sued in this country, although it may be carrying on a large part of its business here, there would be a want of mutuality which one cannot regard as reasonable or right.

LOPES, L.J. If there had been no direct authority bearing on this case I should have thought that according to the true construction of Order IX., r. 8, it applied to a foreign corporation carrying on business in this country, but did not apply to a purely foreign corporation, that is one which does not carry on its business here, and is not within the jurisdiction of this country. In the present case the corporation carries on the business of banking, which is the principal part of its business, in this country. But there is a decision directly in point, not indeed on the construction of this particular rule, but upon the construction of the corresponding section of the Common Law Procedure Act, 1852. Mr. Bigham has tried to distinguish that case from the present, but has not succeeded; and he has asked us if necessary to overrule it. I agree with that decision, and if I did not, I should think it was too late to overrule it, having regard to the fact that the new rule was made with full notice of the construction which had been put upon s. 16. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for defendants: *Lyne & Holman.*
Solicitors for plaintiff Haggin: *Rowcliffes, Rawle & Co.*
Solicitors for plaintiffs Mason & Barry: *Hollams, Son, & Co.*

M. W.

1889
July 2, 5.

[IN THE COURT OF APPEAL.]

RUSSELL *v.* CAMBEFORT.

Practice—Service of Writ—Foreign Partnership carrying on Business in England.

A foreign partnership the members of which are foreigners resident out of the jurisdiction, but carrying on business in this country, cannot be served under Order IX., r. 6, by service on the manager at their principal place of business within the jurisdiction.

O'Neil v. *Clason* (46 L. J. (Q.B.) 191) overruled.

APPEAL from the refusal of the Divisional Court to set aside the service of the writ.

It appeared that the plaintiffs were silk mercers in London, and the defendants commission agents carrying on business at Lyons in France, and in the city of London. The defendants' firm consisted of three partners, all of whom were Frenchmen residing in France. Their business in London was managed by an Englishman. The action was brought for an account of the dealings and transactions between the plaintiffs and defendants, and for payment of the balance due from the defendants to the plaintiffs. The writ having been served on the manager of the defendants' business in London under Order IX., r. 6 (1), the defendants applied to Mathew, J., in chambers to set aside the writ and the service thereof, but the learned judge refused the application, and his decision was affirmed by the Divisional Court, consisting of Field and Cave, JJ., on the authority of *O'Neil* v. *Clason.* (2)

Jelf, Q.C., and *Bray*, for the defendants. The decision in *O'Neil* v. *Clason* (1) was the decision of a Divisional Court, and is not binding on the Court of Appeal. Order IX., r. 6, does not apply to a foreign partnership. It could never have been intended by

(1) Order IX., r. 6, is as follows:—"Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and subject to these rules such service shall be deemed good service upon the firm."

(2) 46 L. J. (Q.B.) 191.

that rule to create a jurisdiction over foreigners out of the jurisdiction which did not exist before. The legislature has no power to sanction service on foreign subjects unless they come within the jurisdiction. If the plaintiffs' contention were correct, two foreigners trading separately in their own names and having offices in this country could not be served, but if they entered into partnership they might be served through their London manager, which would be an absurd result. *Pollexfen* v. *Sibson* (1) is not in point, for there one of the partners was personally served while within the jurisdiction.

Tindal Atkinson, for the plaintiffs. The case is governed by *Haggin* v. *Comptoir d'Escompte de Paris* (2), where it was held that a foreign corporation trading in this country might be served under Order IX., r. 8, by serving their London manager. There is no difference in principle between a corporation and a partnership. A foreign partnership is strictly within the words of the rule, and *Pollexfen* v. *Sibson* (1) is an authority in favour of the plaintiffs; for it was there held that the service on the partner was good not only against him but against the foreign firm, and the judgment in the action would bind the assets of the firm. And that case was stronger than the present, for there was no place of business in England. The observations of A. L. Smith, J., in that case are distinctly in the plaintiffs' favour. *O'Neil* v. *Clason* (3) is a binding authority, and has been acted on ever since its decision. Also in the present case the cause of action arose partly in England.

Bray, in reply. If the cause of action arose in England, the plaintiffs have their remedy by suing the defendants abroad under Order XI., but that fact cannot affect the construction of Order IX., r. 6.

COTTON, L.J. The question that arises on this appeal is as to the validity of the service of a writ of summons on the defendants' firm under Order IX., r. 6. The circumstances are as follows. The firm consists of three persons, all of them French subjects residing in France, and the firm has been served through the manager of their English place of business, and the question we

(1) 16 Q. B. D. 792. (2) Ante, p. 519. (3) 46 L. J. (Q.B.) 191.

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have to consider is whether this is good service. No doubt the rule in question is made under the authority of an Act of Parliament, and that has been relied on as giving it as great an effect as an Act of Parliament; but although an Act of Parliament can give jurisdiction to the Court against British subjects, as to foreigners Parliament has not and does not assume to have jurisdiction against those who are residing abroad, and have not submitted to the jurisdiction of the English Courts. Therefore, in construing the rule, we must have regard to what Parliament has the power to do, and, in my opinion, we should be wrong in construing it as giving jurisdiction against those who are in no way subject to the English Parliament; and although the rule does authorize service on one member of a partnership in general terms, yet it ought to be construed only as applying to partnerships the members of which either by their nationality or residence have become subject to English law and to the power of Parliament. Looking at it in that view I do not think the rule applies to firms consisting of foreigners who have in no way become subject to the English Parliament. It is said that this firm ought to be considered as having submitted itself to English jurisdiction by having a residence in this country, and the recent case of *Haggin* v. *Comptoir d'Escompte de Paris* (1) was relied on, where it was held that a foreign corporation carrying on business here was to be considered as resident in this country and subject to service here. Yes; but there is a distinction between a corporation and a private partnership. A corporation is a creation of law, and can only be said to reside in the place where it carries on business, it can only exist through the action of the persons who carry on its business. Therefore a foreign corporation, which carries on business in this country, has a legal existence here, and unless it can be shewn that it stands in a different position from an English corporation it must be treated as an English corporation would be. In my opinion it cannot be said that a private partnership, or its members, can be considered as resident in this country simply because they are carrying on business here. It may be that the defendants can be served under Order XI., but on that I give no opinion. What I say is

(1) Ante, p. 519.

that they cannot be served under Order IX., r. 6, and that they cannot be served as within the jurisdiction. It may be true that our Courts assume jurisdiction over foreign subjects in respect of certain contracts if broken in a particular way, and also in matters relating to land in this country, and in these cases leave is given to serve foreigners out of the jurisdiction of this country. But, in my opinion, we ought not to construe the rule so as to bring within the jurisdiction persons who neither by nationality nor by residence are capable of being made subject to the jurisdiction. It was said that the point in this case was decided by *O'Neil* v. *Clason* (1) as long ago as 1876, and that that case had been acted on ever since; but, in my opinion, we ought not to follow a decision if we think it was wrong on such a question as jurisdiction. I think that *O'Neil* v. *Clason* (1) was a wrong decision and ought not to be followed. With respect to *Pollexfen* v. *Sibson* (2), that case does not in any way interfere with our decision in the present case, for there one of the partners was served while in England; it did not decide that service can be effected on a foreign partnership under this rule. No doubt there are expressions in the judgment of A. L. Smith, J., with respect to foreign partnerships which are inconsistent with the view that I take of this case; but there was no decision on the point, and if he meant to lay down that service in such a case as this would be good, I think he was wrong.

The proper order in this case will be to discharge the service of the writ, leaving the question open whether the plaintiffs can or not find any other mode of service.

FRY, L.J. I have come to the same conclusion. The facts relevant to the question for decision are these. The firm consists of three French subjects, domiciled in France, and carrying on their business in France. They have an agent in London, and a place of business and property here. The question is whether the partnership can be served in this country under Order IX., r. 6. It is pressed on us, in the first place, that this rule having the sanction of Parliament, is to be considered as having the effect of an Act of Parliament. But primâ facie an Act of Parliament

(1) 46 L. J. (Q.B.) 191. (2) 16 Q. B. D. 792.

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Fry, L.J.

relates only to persons within the Queen's dominions, and does not apply to foreign subjects resident abroad. I therefore approach the construction of the rule from this primâ facie view; but this view is strengthened by the fact that by Order XI., which is devoted to service out of the jurisdiction, and points out the circumstances under which and the manner in which such service may be effected, leave of the Court or of a judge is required, and there is a judicial discretion to grant or refuse such leave. It would be remarkable if we found in another rule that service might be effected without the exercise of judicial discretion on foreign subjects resident abroad. When I read the rule I think it is clear that Order IX., r. 6, can only apply where the partners themselves can be served, but would apply to an English firm who might have their principal place of business abroad. It would be strange if three French gentlemen could be served, although no leave for service had been obtained under Order XI., simply because they happen to be partners having a place of business in England. Suppose the case of a Frenchman or Scotchman carrying on business in his own name in his own country, but with a place of business, a shop for instance, with his own name over the door in this country: he could only be served in France or Scotland under Order XI., but if the plaintiff's construction of Order IX., r. 6, be correct, it would follow that he could be served in London if he only used the words "and Company" after his name. Such a construction would enlarge the jurisdiction of the Courts over foreigners resident abroad, a result which was never intended by the legislature.

I may observe that although Parliament may in some cases assume the power of exercising jurisdiction over foreign subjects having property here, yet that is not according to the general procedure of the English law.

As to the two cases cited, *O'Neil* v. *Clason* (1), and *Pollexfen* v. *Sibson* (2), if and so far as they are inconsistent with our decision in this case, I must dissent from them.

LOPES, L.J. The question on this appeal depends upon the true construction of rule 6 of Order IX. I think that the rule does

(1) 46 L. J. (Q.B.) 191. (2) 16 Q. B. D. 792.

not give jurisdiction as against foreign subjects. The rule cannot have a greater effect than an Act of Parliament, and Parliament itself could not give such jurisdiction. I think the rule only applies to English subjects.

With respect to the service of the writ under Order XI. I give no opinion. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Clarke, Woodcock, & Ryland.*
Solicitors for defendants: *Bell, Brodrick, & Gray.*

M. W.

[IN THE COURT OF APPEAL.]

July 24.

EDWARDS *v.* SALMON.

Local Government Acts—Officer of Local Authority—Acceptance of Fee or Reward under Colour of Office—"Allowance" in addition to Salary—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 189, 193.

The council of a borough, being also the local sanitary authority under the Public Health Act, 1875, appointed the defendant, a solicitor and the town clerk of the borough, to be clerk to the sanitary authority; and by a resolution of the council the defendant's salary was fixed at a certain sum "to include all legal charges except for contentious business matters, travelling expenses and payments out of pocket." Subsequently the council, as local sanitary authority, promoted a sewage scheme, which had not been contemplated when the defendant's salary was fixed, and in connection with this scheme the defendant did work, partly in respect of contentious and partly in respect of non-contentious matters. On the completion of the sewage works the council passed a resolution that the defendant be paid a sum of money for his services in connection with the scheme; and the money was duly paid to and received by him:—

Held, that the facts did not shew an acceptance by the defendant under colour of his office or employment of a fee or reward other than his proper salary, wages and allowances within the meaning of s. 193 of the Public Health Act, 1875, and that he was not liable to the penalty imposed by the section.

Semble, the word "allowances" in s. 193 of the Public Health Act, 1875, includes extra payments for extra work, and is not limited to allowances in respect of lodgings, coals, gas, and other like matters.

APPEAL from the judgment of Pollock, B., in an action tried before him without a jury. The action was brought to recover a penalty of 50*l.* under s. 193 of the Public Health Act, 1875, on the ground that the defendant, the town clerk of Bury St.

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Edmunds, had as the clerk of the urban sanitary authority accepted, under colour of his office or employment, a fee or reward other than his proper salary, wages, and allowances within the meaning of that section.

The defendant was at the time of the passing of the Public Health Act, 1875, town clerk of Bury St. Edmunds, and the town council having become the urban sanitary authority under that Act the defendant was appointed clerk to the sanitary authority. In 1879 his salary was fixed by resolution of the town council at 365*l.* per annum, "to include all legal charges except for contentious business matters, travelling expenses, and payments out of pocket." In 1883 the town council as the sanitary authority promoted a sewage scheme, which was opposed by some of the inhabitants; but after an inquiry by the Local Government Board, compulsory powers were obtained and the scheme was carried out. During the three years which elapsed before completion, the defendant carried out the whole of the legal business connected with the scheme, such as attending the Local Government Board inquiry, obtaining loans and preparing contracts, mortgages, and conveyances. It was admitted that this work had not been contemplated when the defendant's salary was fixed in 1879, but no resolution had been passed at the time the work commenced for any increase of salary in respect of it. No bill of costs was sent in by the defendant in respect of his work in connection with the scheme, but after the completion of the sewage works the town council, on the recommendation of the sewage and irrigation committee, passed a resolution on December 6, 1887, that the defendant be paid 500 guineas for his services in respect of the scheme, to include everything except only payments out of pocket, and on the following day the defendant signed a receipt in these terms:—"Received of the urban sanitary authority for the borough the sum of 325*l.*, balance of the sum of 525*l.* agreed to be paid to me in full satisfaction and discharge of my professional work in connection with the new sewerage works extending over the past three years and a quarter."

At the trial Pollock, B., gave judgment for the defendant. The plaintiff appealed.

Candy, Q.C., and *Slee*, for the plaintiff. The defendant has brought himself within the language and intent of s. 193 of the Public Health Act, 1875, by accepting a sum of money which was other than his salary, wages or allowances. (1) The only power of the town council was to raise the salary of their town clerk if they considered it insufficient, and it was not competent to them without doing so to make him a present of the ratepayers' money. The facts shew that this was not an extra remuneration for extra services, but that the defendant's regular work was simply heavier than usual. It is true that in respect of the contentious business which he did the defendant would have been entitled to send in his bill of costs, but this was only a small proportion of his work, and for the non-contentious business he had already been paid in his fixed salary.

Such a payment is not "salary" or "wages"; neither does it come under the term "allowances." It is true that in *Burgess* v *Clark* (2) Lord Esher, M.R., defined the word "allowance" as "a payment beyond the agreed salary of the officer for additional services rendered by him"; but in the same case Cotton, L.J., confined the meaning of the word to "the use of a room, or coals, or candles, or articles of the like kind, or an allowance for the payment of them"; while in *Reg.* v. *Mayor of Ramsgate* (3) Field, J., expressed a preference for the latter view, and defined the word as an allowance of something other than money.

(1) By s. 189 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "Every urban authority shall from time to time appoint fit and proper persons to be medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer . . . The urban authority may pay to the officers and servants so appointed or employed such reasonable salaries, wages or allowances as the urban authority may think proper."

By s. 193: "Officers or servants appointed or employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act.

"If any such officer or servant is so concerned or interested, or, under colour of his office or employment, exacts or accepts any fee or reward whatsoever, other than his proper salary, wages and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of fifty pounds, which may be recovered by any person, with full costs of suit, by action of debt."

(2) 14 Q. B. D. 735.

(3) 23 Q. B. D. 66.

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Channell, Q.C., and *Poyser*, for the defendant, were not called upon.

LORD HALSBURY, L.C. I am of opinion that this is a frivolous and vexatious action, and that the appeal must be dismissed. It is not necessary for me to give any large exposition of the section of the Act of Parliament, for, whatever may be its true interpretation, the facts of the present case are far outside any possible construction that can be put upon it; and it is enough to say that on these facts there is not the slightest colour or pretence for the plaintiff's contention. The section is prohibitory; it starts by prohibiting officers and servants employed under the Act by the local authority from being concerned or interested in any bargain or contract made with the local authority for the purposes of the Act, and the policy of such a prohibition is apparent; for the permitting of the officers and servants of a local authority to have an interest in the contracts made with their employers might give rise to the making of corrupt bargains by which the ratepayers' money might be squandered. The section then proceeds to impose a penalty upon officers and servants "so concerned or interested"; stopping at those words, it is admitted that no such case arises here; it is said, however, that the words which follow, "or under colour of his office or employment exacts or accepts any fee or reward whatsoever other than his proper salary, wages or allowances," point at a transaction like the present. It is said that the amount of the defendant's salary had been duly fixed by resolution; but at the time when it was so fixed the sewage works were not in contemplation, and the consequence of the carrying out of this scheme was that the labour imposed on the town clerk became considerably greater than had been contemplated. It is not for us to inquire into the amount of his work or of his remuneration, but there is no doubt that in the face of day and by a resolution of the proper authority an extra amount of money was regularly voted to him. Then this action is brought to recover a penalty of 50*l.*, and also to render the town clerk incapable of holding any office under the Public Health Act for the rest of his life. What part of the section has been infringed? It may be that a perfectly bonâ fide

transaction might come within the prohibition, but the whole point of that part of the section relied on in the present case is the exaction or acceptance under colour of his office of fees and rewards other than his proper salary, wages, or allowances. I think that the language of the section points to a transaction outside the determination by the employers of the remuneration to be paid to their officers and servants; but whether that be so or not there was in the present case every element necessary to give power to the local authority to fix the amount of the defendant's remuneration.

From this point of view it is quite immaterial to consider whether this remuneration would come under the head of salary, wages or allowances. But I cannot concur in the opinion apparently expressed by Cotton, L.J., and adopted by Field, J., that the word "allowance" must be limited to such matters as lodging, coals or gas; it obviously includes, as was said by the Master of the Rolls in *Burgess* v. *Clark* (1), extra payment for extra work, which was precisely the nature of the remuneration of the defendant in the present case. It would be an undue compliment to this action were I to expound the section more than is necessary.

LORD ESHER, M.R. I am of the same opinion. Notwithstanding the criticism to which my definition of the word "allowances" in *Burgess* v. *Clark* (1) has been subjected, I do not alter one word of what I there said.

LINDLEY, L.J. I am entirely of the same opinion.

Appeal dismissed.

Solicitor for plaintiff: *Alexander Pope.*
Solicitor for defendant: *Gilbert Robins.*

(1) 14 Q. B. D. 735.

W. J. B.

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March 14, 15; *April* 3.

[BEFORE THE RAILWAY AND CANAL COMMISSION.]

BETWEEN THE PELSALL COAL AND IRON COMPANY, LIMITED, APPLICANTS, AND THE LONDON AND NORTH-WESTERN RAILWAY COMPANY, DEFENDANTS.

Railway and Canal Commission—Jurisdiction—Practice—Order requiring Railway Company to divide Rates in Rate-books—Evidence necessary to support Application—"Any person interested"—Power to make Order in Cases in which a Railway Company books to Stations not on its own Line—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 14—*Railway and Canal Traffic Act,* 1888 (51 & 52 *Vict. c.* 25), *ss.* 14, 33, 34.

By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 45), s. 14, "Every railway company and canal company shall keep at each of their stations and wharves a book or books shewing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged.

"The commissioners may from time to time on the application of any person interested make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses."

Semble, that the expression "person interested" in s. 14 is not limited to persons paying the rates which are the subject of the application.

Semble (per Wills, J., and Mr. Commissioner Price), that the expression "person interested" in the section includes any person who makes out by proper evidence that the rates which he seeks to have distinguished are really and substantially competitive rates with his own, and (per Commissioner Sir F. Peel) that it includes "all persons who have a bonâ fide interest in knowing how the particular rates which are the subject of their application are made up."

Semble, that the Court has power under the section to require a railway company to distinguish rates in its rate-books in cases in which the company books traffic to stations which are not upon its own line.

SUMMONS adjourned into Court for hearing, being an application under s. 14 of the Regulation of Railways Act, 1873 (1), by the

(1) By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 14: "Every railway company and canal company shall keep at each of their stations and wharves a book or books shewing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they

Pelsall Coal and Iron Company, Limited, as "interested" within the meaning of the section, for an order (1) that the London and North-Western Railway Company should distinguish in the book

book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged."

"The commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much for other expenses, specifying the nature and detail of such other expenses."

By the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 1: "This Act shall be construed as one with the Regulation of Railways Act, 1873, and the Acts amending it."

By s. 14: "The commissioners may order two or more companies to which this part of this Act applies to carry into effect an order of the commissioners, and to make mutual arrangements for that purpose, and may further order the companies, or, in case of difference, any of them, to submit to the commissioners for approval a scheme for carrying into effect the order, and when the commissioners have finally approved the scheme, they may order each of the companies to do all that is necessary on the part and within the power of such company to carry into effect the scheme, and may determine the proportions in which the respective companies are to defray the expense of so doing, and may for the above purpose, make, if they think fit, separate orders on any one or more of such companies.

"Provided that nothing in this section shall authorize the commissioners to require two companies to do anything which they would not have jurisdiction to require to be done if such two companies were a single company."

Sect. 33 "(2.) Printed copies of the classification of merchandise traffic, and schedule of maximum tolls, rates and charges of every railway company authorized, as provided by this Act, shall be kept for sale by the railway company at such places and such reasonable prices as the Board of Trade may by any general or special order prescribe."

"(3.) The company shall within one week after application in writing made to the secretary of any railway company by any person interested in the carriage of any merchandise which has been or is intended to be carried over the railway of such company, render an account to the person so applying in which the charge made or claimed by the company for the carriage of such merchandise shall be divided, and the charge made for conveyance over the railway shall be distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified.

"(4.) Every railway company shall publish at every station at which merchandise is received for conveyance, or where merchandise is received

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or books of rates and distances kept respectively at the following stations, viz.: Pelsall Station, Rugeley Station, Hednesford Station, Cannock Station, Wyrley Station, Bloxwich Station, Hammerwich Station, Brownhills Station, Rushall Station, Great Barr Station; or in the books of rates and distances kept at the stations nearest respectively to the places at which traffic was received from the collieries next thereafter mentioned; how much of the rates respectively charged by the company to the applicants and to the Brereton Colliery, Hednesford Colliery, Great Wyrley Colliery, Cannock Chase Colliery, Harrison's Siding, Conduit Colliery, Hamstead Colliery, Leighswood and Coppice Collieries, and Walsall Wood Collieries, for the carriage of coal and slack to the following stations and sidings to which the company quoted a rate, viz.: Barton, Banbury Street Birmingham, Barr's Court, Bloxwich, Cheltenham, Curzon Street Birmingham, Darlaston (Horton Sidings), Ledbury, Monument Lane, Trent Valley, Wolverhampton, Walsall, Wednesbury (Hunt's Siding), Windsor Street, and Shenstone, was for the conveyance of the said coal and slack on the said railway or railways, including therein tolls for the use of the railway or railways, and for use of carriages and locomotive power, and how much of the said respective rates was for other expenses, specifying the nature and detail of such other expenses; (2) that the London and North-Western

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at some other place than a station then at the station nearest to such place, a notice, in such form as may be from time to time prescribed by the Board of Trade, to the effect that such book, tables and documents touching the classification of merchandise and the rates as they are required by this section and s. 14 of the Regulation of Railways Act, 1873, to keep at that station, are open to public inspection, and that information as to any charge can be obtained by application to the secretary or other officer at the address stated in such notice."

Sect. 34. "When traffic is received or delivered at any place on any railway other than a station within the meaning of s. 14 of the Regulation of Railways Act, 1873, the railway company on whose line such place is shall keep at the station nearest such place a book or books shewing every rate for the time being charged for the carriage of traffic other than passengers and their luggage from such place to any place to which they book, including any rates charged under any special contract, and stating the distance from that place of every station, wharf, siding, or place to which such rate is charged.

"Every such book shall, during all reasonable hours, be opened to the inspection of any person without the payment of a fee."

Railway Company should distinguish in the book or books of rates and distances kept at Pelsall Station how much of the rates charged by the company to the applicants in respect of the carriage of (*a*) damageable iron and (*b*) iron not damageable, as referred to in ss. 63 of the Act 9 & 10 Vict. c. cciv., (1) in lots under two tons in weight, (2) in lots over two tons in weight, (3) in full truck loads, to the following stations and sidings, viz., Darlaston, Wednesbury, Windsor Street Birmingham, Curzon Street, and Albion, Walsall, and Wolverhampton, to which rates were quoted by the company, was for the conveyance of iron as above respectively specified on the railway, including therein tolls for the use of the railway, and for the use of carriages and locomotive power, and how much was for other expenses, specifying the nature and details of such other expenses; (3) that the company should deliver to the applicants within such time as the Court should order a list or account in writing of the whole of the above rates and expenses, distinguished and specified as to their nature and detail as aforesaid, and also of the distances in respect of which each of such rates was respectively charged."

The same order was applied for by the Pelsall Coal and Iron Company against the London and North-Western Railway Company by way of interlocutory application in an application under the Railway and Canal Traffic Acts, 1873 and 1888, dated March 1, 1889, in which the applicants complained of undue preference shewn by the defendants to the above-mentioned collieries and of illegal charges, and claimed a return of overcharges and damages.

This application recited that the applicants were owners of large collieries and ironworks in Staffordshire connected with the South Staffordshire Railway, a part of the defendants' system by a private line which joined the South Staffordshire Railway at Rhyder Hayes Junction, that the collieries in question were situated on that line or on branches of it, and that they all sent coal and slack over the same lines of railway with the applicants and were competitors with them in the same trade and in the same districts and markets. There were two schedules to this application, the first containing among others the stations and sidings mentioned in the first paragraph of the summons as

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stations to which coal and slack were conveyed by the defendants for the applicants and the competing collieries, the second containing among others the stations mentioned in the second paragraph of the summons as stations to which iron was conveyed by the defendants for the applicants and certain competing furnaces.

Mr. Bullock, the general manager of the applicants, stated in an affidavit, with reference to the application of March 1, 1889, that the applicants sent large quantities of coal, slack and iron to the stations mentioned in the schedules thereto, and paid a large sum annually to the defendants for carriage; that the collieries mentioned in paragraphs 11, 16, and 17 of the application (which were those mentioned in the summons) produced similar slack and coal and were in competition with the applicants, and that the charges made by the defendants to these collieries for the conveyance of coal and slack to the stations mentioned in the first schedule to the application and for services were lower in proportion to the distance travelled and the services rendered than those made to the applicants; and that the applicants could not set out the full grounds of their complaint without the information claimed. An affidavit of Mr. Horton, one of the applicants' directors, was to the same effect.

Littler, Q.C. (with him, *Moon*), for the applicants. The applicants are entitled to the order under s. 14 of the Regulation of Railways Act, 1873. The affidavits shew that the applicants are "interested" within the meaning of the section, as the collieries in question compete with their colliery.

R. S. Wright, for the defendants. The applicants are not entitled to the order. It is submitted that they are only "interested" within the meaning of the section as regards the particulars of the rates with which they are themselves charged by the defendants for the carriage of goods from their own colliery. The words of sub-s. 3, s. 33, of the Railway and Canal Traffic Act, 1888, "any person interested in the carriage of any merchandise" are in pari materiâ. Some of the stations mentioned in the summons as stations to which the defendants "quote a rate" are not on the London and North-Western Railway. The section can scarcely mean that the defendants may be called

upon to divide rates charged by other companies, the particulars of the division of which they have no means of ascertaining. The expression "the railway" in the section must refer to the railway of the company which the statute places under an obligation. The fact that this obligation is enforceable by criminal proceedings shews that the section cannot be intended to be used in aid of an application against undue preference.

The Court has no jurisdiction to order the defendants to prepare a list of divided rates, as claimed in the summons, or to grant any part of the interlocutory application.

Littler, Q.C., in reply.

Cur. adv. vult.

April 3. WILLS, J. This is an application under s. 14 of the Regulation of Railways Act, 1873, by the Pelsall Coal and Iron Company, Limited, against the London and North-Western Railway Company.

The first branch of the application specifies ten stations (which I will call stations A), and refers to others (which I will call stations B) as the "nearest respectively to the places at which traffic is received" from nine specified collieries. It alleges that the London and North-Western Company "quote a rate" to each of fifteen specified stations (which I will call stations C), and asks that in the books of rates and distances kept at each of the ten stations first specified (stations A) and at each of those —whatever and of whatever number they may be—so described as aforesaid (stations B) the company may be ordered to distinguish how much of the rates charged to the applicants and to each of the nine specified collieries for carriage of coal and slack to each of the fifteen specified stations C is for conveyance of traffic on "the railway or railways" and how much is for other expenses.

The affidavits in support of this application state (affidavit of Horton) that seven of the nine collieries specified are near to the applicants' colliery, and with respect to the two others that their traffic is received on to the South Staffordshire Railway (which is part of the system of the London and North-Western Company) at a place called Rhyder Hayes Junction.

The affidavits further state that the applicants send coal and

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Wills, J.

slack *to* each of the fifteen specified stations C, and that the two collieries whose traffic is received at Rhyder Hayes Junction send coal and slack to the same stations as the applicants; whence it follows that they send coals and slack to each of the fifteen specified stations C. It is alleged that each of the nine specified collieries competes with the applicants in the same trade, the same districts, and the same markets. Except as may be inferred from this allegation, it is nowhere stated that the coal and slack of seven out of the nine specified collieries are conveyed *to* or delivered *at* any of the specified stations C. It is nowhere alleged that coal and slack are sent by the London and North-Western Railway *from* any of the ten stations A, nor that any of these stations A are stations of the London and North-Western Company, nor that any of the nine specified collieries send coal or slack from any of the ten stations A.

It is alleged that as to seven out of the nine specified collieries the railway company charge to the owners lower rates than they charge to the applicants, and that, as to the remaining two, whose coal and slack are put on to the London and North-Western system at Rhyder Hayes Junction, the railway company perform for them gratuitously important and costly services which they do not perform for the applicants.

No other material facts appear from the affidavits nor from the portions of an application by the applicants to this Court bearing date March 1, 1889, which are incorporated into the affidavits by reference.

It was stated on the argument before us that some of the fifteen specified stations C are stations of the London and North-Western Railway, and some belong to other companies. There is no statement in the affidavits that any one of them belongs to the London and North-Western Company, and consequently no means of distinguishing which of them belong to other companies.

I must now call attention to the nature of the jurisdiction which we are called upon to exercise.

Sect. 14 of the Act of 1873 provides that every railway company shall keep at each of its stations a book or books shewing every rate for the time being charged for the carriage of goods traffic from that station to any place "to which they book" (including

any rates charged under any special contract) and stating the distance from that station of every station to which any such rate is charged.

It further provides that the commissioners may from time to time, on the application of any person interested, make orders with reference to any particular description of traffic, requiring a railway company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway and how much for other expenses.

The jurisdiction, being to order entries to be made in the book referred to by the earlier part of the section, is confined to such rates as either do appear or ought to appear in the book, and by that part of the section the duty of the company is confined to rates to any place "to which they book," whatever may be the meaning of that expression.

Upon this part of the case the affidavits are entirely silent. There is an allegation in the *summons* that the railway company "quote a rate" *to* each of the fifteen specified stations C; but even in the summons it is not said *from* what stations they quote such rates. It is stated that the applicants regularly send coal and slack by the London and North-Western Railway Company *to* each of the fifteen specified stations C, and pay large sums annually to the railway company for the carriage of such goods; but even with respect to the applicants' traffic it is not stated *from* what station or stations it is sent, and the only guess even that can be made on this subject is that probably the Pelsall Company send a good deal of traffic from Pelsall Station.

It appears to me that upon this point the materials are insufficient, and not in any degree what this Court has a right to expect and ought to require. To "book to a station" is an expression that does not necessarily explain itself, and the interpretation of which is certainly capable of being modified by evidence; and so of "quoting a rate." If I had to interpret the two phrases myself by the light of nature and apart from evidence, I should say that they are not synonymous though closely connected. I should think that if it was not the habit of a railway company to send goods through from their station X to station Y, station Y being on a foreign railway, and that, if they had no existing arrange-

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ments with the foreign company which would enable them as a matter of course to send goods through to Y, the answer to the inquiry "Do you book to Y?" would in ordinary course be "No," or perhaps "We can book to Z which is on our line, but at Z we can only deliver your goods to the foreign company." I should have thought the next step would be for the customer to say "Will you quote a rate?" and that the natural answer would be "We will consult the other company and see what arrangements can be made with them;" and I am quite certain from the sort of correspondence which has come from time to time under my eyes in railway matters, that it often enough happens under such circumstances that the inquiry is not answered for weeks or even months; and I am not at present, and without more evidence as to commercial and railway practice, inclined to think that an isolated transaction of that kind, though a rate were ultimately quoted and accepted between station X and station Y, and goods were sent and paid for on that footing, would constitute a case in which the company "book" from X to Y within the meaning of the section. On the other hand I wish to give no countenance to the notion that the companies can evade the section by calling the process "quoting a rate" when they in reality are making a practice of regularly accepting goods on definite terms to be conveyed from X to Y. I think it may be gathered from the affidavits that from somewhere—and notably from Rhyder Hayes Station—to each of the fifteen stations C the London and North-Western Company do as a matter of course accept coal and slack from the applicants, and, as far as the traffic received on to their system at Rhyder Hayes is concerned, carry it for two out of the nine specified companies to each of the fifteen stations C. I do not think the affidavits go further, whatever one may suspect to be the case; and, in respect of traffic which they *ought* to book but do not, I certainly should be no party to refusing to exercise the jurisdiction because the railway company when really *booking* preferred to call the transaction "quoting a rate," and I should feel no difficulty, if the materials were adequate in other respects, in adding to the order sought the preliminary order to enter the rate, as one to a place to which the company booked, in the book kept at station X.

A further question has been raised as to whether the applicants are parties "interested" within the meaning of the section. The London and North-Western Company contend that no one is "interested" within the meaning of the section, except the person who has to pay the rate in respect of which the order is sought. There was a good deal of verbal criticism, on both sides, as to the meaning of this word, and reference was made to other sections and to other Acts in which the expression has been used. To my mind it seems much more satisfactory to say that the expression used in s. 14 occurs in one of a series of Acts of which one of the main purposes (if not the most important purpose of the first of them, the Act of 1854) was to put a stop to undue preferences, and that the usefulness of this section would be destroyed and its aim paralyzed by putting upon it any such narrow construction. In my opinion any person who makes out by proper evidence that the rates which he seeks to have dissected are really and substantially competitive rates with his own is a "person interested" within the meaning of the section.

I am equally clear that it is the duty of the applicant to make out such a case; that the Act did not mean to oblige the railway company to volunteer the information in question in their books or elsewhere, nor to subject them either to the indulgence of an idle and vain curiosity or to a speculative or vexatious endeavour to make out a trivial or imaginary grievance. If Parliament had meant to put them under any duty to give the information to all comers, it would have said so, and instead of giving them the protection of the interposition of the commissioners, would have imposed upon them the liability at once, and would have left to the commissioners merely the power and the duty of enforcing the statutory obligation. Sect. 33 of the Act of 1888 goes further than the Act of 1873, and enables the customer without the help of the commissioners to call upon the railway company under certain circumstances to dissect a rate for him; but the application of the section is much more confined than that of s. 14 of the Act of 1873, and does not appear to extend to anyone but persons interested in having the goods to which the rate applies carried; and the order of the commissioners is still necessary in cases in which the applicant is interested only in the wider sense

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which I attribute to that expression in s. 14 of the Act of 1873.

I wish to add that once it is established that the applicant is *interested*, a very moderate degree of evidence shewing a legitimate purpose for which the information is sought would in ordinary cases be sufficient to satisfy me that the discretion of the commissioners ought to be exercised in favour of the application.

The foregoing considerations shew how necessary it is that the commissioners should insist upon having the case properly brought before them, instead of being invited, as they are in the present instance, to make a whole series of assumptions, unsupported by evidence, in order to enable the applicants to establish their case.

One important question has been raised as to whether the London and North-Western Railway Company can be called upon to divide the total charge into conveyance and other expenses in respect of traffic carried by them to stations off their own lines. It was asserted on their behalf that if they knew the proper division between conveyance and other expenses as to the portion of the charge applicable to the foreign line, it was an accident, and that very often such division is not in fact made known where one company agrees with another upon a through rate. It was as confidently asserted on the other side that the elements of the total charge are always perfectly well known to all the companies concerned in an arrangement for a through rate. It would certainly be contrary to general principles for a Court to order a company to do something which it was satisfied that company could not do; and the assertions I have referred to, however confidently made, rest upon no evidence and may therefore be put on one side. But the section under discussion is clearly not confined to rates upon one line only. It deals with the rate to any place to which the company *books*, and nobody can doubt that when the Act of 1873 was passed there were plenty of instances in which the companies booked to places off their own lines. The enactment must have been intended to apply to such cases amongst others; and, although the definite article is used and the division is to be made between conveyance upon "*the*

railway" and other expenses, I cannot think "*the* railway" is confined to the railway belonging to the sending company. It is clearly implied that "conveyance upon the railway" and "other expenses" taken together comprehend the whole charge. I think "other expenses" means "expenses other than conveyance," and not "other than conveyance upon the section of the railway belonging to the sending company" and that "conveyance by the railway" means no more and no less than "conveyance by railway" as distinguished from expenses of another description. The companies are effectually protected from unreasonable orders or from orders with which they cannot comply by the fact that they are under no duty to give the information required until they are ordered by the commissioners so to do; and, if, when any similar application is made, the company opposing the application should satisfy the Court that they have not the means of dividing the charge as the Act of Parliament contemplates, they are not likely to be ordered to do so. But, as the only result of such a state of things would be that under s. 14 of the Act of 1888 the other company or companies concerned in fixing the through rate might be added as defendants to the application, and the requisite order made after all the companies whom it might be necessary to comprise in the order had been heard, it is certainly not for the advantage of the companies any more than it would, I think, be consistent with the Act of Parliament, to refuse the application on the ground that part of the conveyance and services were done over the lines and by the servants of a foreign company, unless the company resisting the application satisfies the Court that it cannot reasonably comply with the order sought.

This portion of the application is therefore refused not on the broader grounds of objection taken by the railway company, but because the affidavits are wholly insufficient to satisfy the requirements of the section as to any portion of the rates to which it refers. The application in respect of stations B is far too vague to be acted upon, and in respect of them the affidavits say simply nothing.

A second branch of the summons relates to charges for iron from Pelsall Station to five specified stations to which it is alleged that the London and North-Western Railway Company quote a

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rate, and asks for a similar division of the rates to each of these five stations which are charged to the applicants. The facts stated in the affidavits with respect to this traffic are that iron is sent in large quantities from the applicants' works to the five specified stations by the London and North-Western Company's lines and carriage paid in respect thereof. It is not stated in the affidavits *from* what station they are sent, and it is only from the fact that the company is named the Pelsall Company that even an inference can be gathered that goods are likely to be sent by them from Pelsall Station. There is no allegation of competitive traffic in iron on the part of any one else having similar goods delivered at a lower rate by the London and North-Western Company, and no reason given why the information is desired. There is no evidence, therefore, to shew either that the applicants are interested in the charges, or why it is that, if interested, they have not availed themselves of s. 33 of the Act of 1888 and made written application under that section to the secretary of the company instead of coming to the commissioners for what may be a wholly unnecessary order. If it is necessary to resort to s. 14 of the Act of 1873, I certainly am not inclined to make an order under that section without knowing why it is asked for.

There is a third branch of the application which asks that the railway company shall be ordered to deliver a list of all the charges above referred to, divided into their elements as aforesaid, to the applicants. It is clear we have no jurisdiction to make any such order.

The materials upon which our interference has been invoked are so exceedingly deficient and unsatisfactory, and have been put together with such exceeding haste and carelessness as to make it scarcely even respectful to the Court to come before it in such a fashion, and had it not been that the railway company have resisted the application not only on these grounds, but upon other grounds of great general importance in which we think that their contentions cannot be supported, the applicants ought in my opinion to have been ordered to pay the costs of the summons. As it is, the summons is dismissed without costs; but I wish it to be understood that in my opinion such a neglect to

bring before the Court definite and intelligible materials upon which to ground an application ought in general, and unless there is some such countervailing reason as exists in this case, to entail upon those who so bring it forward the penalty of costs.

The applicants took out another summons in the matter of their application of March 1, 1889, complaining of undue preferences, asking by such summons for the same order as asked for in the summons already dealt with. It was scarcely even seriously argued that it fell within any of the ordinary principles upon which discovery or any other remedy ancillary to and made in any contentious proceeding in Court is usually granted; and this summons, as being alike unnecessary and unfounded, must be dismissed with costs.

I have the authority of Mr. Price for saying that he concurs in this judgment.

SIR FREDERICK PEEL. This is an application under s. 14 of the Act of 1873. By the 1st and 2nd clauses of that section it is provided that companies shall publish their charges for goods in rate-books "open to the inspection of any person," and by its 3rd clause that the commissioners may "on the application of any person interested" make orders, with respect to any particular description of traffic requiring a company to distinguish in such book how much of such rate is for conveyance on the railway, and how much for other expenses.

The Pelsall Iron and Coal Company apply under this 3rd clause for an order as regards the rates charged by the London and North-Western Railway Company for the conveyance of coal and slack from Pelsall and other stations on their railway to various places, of which some are on the same company's railway and some on the railways of other companies: and the application is opposed on the ground, first that, except as to Pelsall station, the applicants are not "a person interested" within the meaning of the statute, as no traffic is booked for them at any of the stations, Pelsall excepted: and secondly, that as to rates to the stations of other companies, the rates a railway company may be required to divide do not include rates to places off its own line.

A preliminary question arises, whether the summons does not

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ask for an order in a form in which it could not in any case be granted. It asks for an order on the railway company to divide in the rate-books kept at certain stations belonging to them the rates charged for the conveyance of coal and slack to certain other stations "to which they quote a rate." Now our power to order rates to be divided is limited to rates in a rate-book, and the rate-book at any station is only required to shew, and would only shew, the rates charged from that station to any place to which the company book. We have no power to order quoted rates as such to be divided: for a rate may be quoted without any traffic being sent to the company to be carried at it, and in that case it is not necessary that it should appear in the rate-book. The summons, therefore, is not sufficiently precise, and should either have been expressly limited to rates in the rate-books or have specified the rates proposed to be divided as rates to places to which the company book. As, however, there appears to be no doubt that rates shewn in the rate-books are the only rates intended to be referred to in the summons, and no reason to believe that there are any other rates charged for the carriage of coal and slack from and to the several termini named, I should, in exercise of the power given by rule No. 63, allow the summons to be amended in this respect.

It is also said that the affidavits in support of the summons are vague and insufficient. But there are, I think, some material facts to be gathered from them additional to those mentioned in the judgment just delivered. Bearing in mind that the affidavits identify the competing collieries with those mentioned in the 11th, 16th, and 17th paragraphs of the other application of the Pelsall Company, that dated March 1, the facts I gather from them are as follows:—

1st. That all the collieries, Pelsall included, are near each other, and are on the main line, or branches of the South Staffordshire Railway, known to be part of the system of the London and North-Western Railway. I refer to Horton's affidavit, and to pars. 16 and 17 of the application of March 1:

2nd. That all produce a similar coal and slack, and compete in the same trade and in the same markets:

3rd. That the applicants send coal and slack to all the fifteen

places named in the first paragraph of the summons as places to which the London and North-Western Railway quote a rate (Bullock's affidavit); and that similarly coal and slack are conveyed to all the same places for all the competing collieries (Bullock's affidavit), and that the charges made to the collieries for the conveyance to such places are made by the London and North-Western Company:

4th. That, although it is true that the affidavits do not give the names of the stations on the South Staffordshire Railway from which the traffic of Pelsall and the competing collieries is sent, the form of the summons is, as it seems to me, such as to dispense with this. The affidavits shew the coal and slack of the different collieries to be all received by the London and North-Western Railway on their railway; and the summons, in accordance with s. 34 of the new Act, the Act of 1888, describes the stations, to the rate-books of which it applies, as the stations nearest to where the traffic is received. It mentions certain stations as sending stations, but the rate-books to which it asks that an order may apply are the books either of those stations or of the stations nearest to the places where traffic is received: and considering that the traffic in this case is coal and slack sent direct from the collieries, and that the railway company know best which of their stations are nearest to the colliery sidings, and have the rate-books kept at them, the circumstance that the affidavits do not say more on this point of whence the traffic goes is not, I think, material. While, therefore, I quite feel with the learned judge that the affidavits are far from being unexceptionable, I incline to think that they still sufficiently support the summons and shew by the facts they allege the interest the applicants have in the subject of it.

On the question as to the meaning of the words "any person interested," which is the railway company's first ground of objection, the contrast in clauses 2 and 3 of the 14th section between who may inspect a rate-book and who may apply to have the rates in such book divided, is evident. For the first purpose it is sufficient to be simply one of the public: but in the other case we have to see that it is a person "interested" who asks for the order, just as, before we grant a through rate under s. 11 of the

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same Act, we have to consider whether it will be "in the interest of the public" to grant it. According to the railway company's view, the right of a party to avail himself of this 3rd clause of s. 14 is limited to such rates as his own traffic is booked at. But that is the one purpose for which the clause was least, if at all, needed; for by the Regulation of Railways Act, 1868, s. 17, a company, which has been paid any charge for the conveyance of goods, is bound to render an account to the customer, distinguishing how much of the charge is for conveyance and how much for terminals. This provision was incomplete, so far as it required the charge to be first paid: but the Act of 1888 (s. 33, sub-s. 3) has remedied this, and the customer can now require the division at any time. It must, however, be a customer; it must be, in the words of the sub-section, "a person interested in the carriage of merchandise which has been, or is intended to be, carried over the railway of such company." But if, when the object is to give a person power to require a railway company to divide rates, but to restrict such power to the rates on his own traffic, this is how the legislature describes him, it may fairly be inferred that such special language would not have been used, if the mere words "any one interested" would have sufficed, and actually occurred in that sense in the former Act, the Act of 1873. Again, if there is any one class of rates,—which ought not to have an exemption which other classes have not,—from being shewn in detail, it is rates under special contract. These furnish the readiest means of shewing preference and favouritism, and on this account they are especially mentioned in the 14th section, and ordered to be included and set down in the rate-books; but, if we can make no order for their division except at the instance of the customer with whom the railway company have made the special contract, these rates will necessarily escape altogether, for it is manifestly unlikely that the parties for whom special contracts are in force will themselves ever apply to have them set forth in detail in the rate-books. There is, therefore, much to be said for the expediency of not construing the word "interested" so strictly. It was admitted, I think, by Mr. Wright, that used by itself, as here, it is not a word of any technical or special legal sense, and I can see nothing to require or suggest the narrow construction that that

species of interest only is intended which arises from actual dealings with a company at the particular rates. In the common case of persons about to enter upon some business on premises adjoining a station, and seeking to know all about the rates on their particular description of traffic, and who have made and been refused a demand for such information, are they to be denied a locus standi under this section, because they have as yet had no transactions with the railway company? They are interested beyond all doubt, and all that the enactment requires is that an applicant should be interested. It does not say interested in any particular way, nor at all how interested; and as the enactment is not one to be narrowly expounded, I am of opinion that interested means here, what it would mean in popular language, however interested, and that it takes in all persons who have a bonâ fide interest in knowing how the particular rates that are the subject of their application are made up. Here the applicants claim to be interested on the ground that they have made a complaint under s. 2 of the Traffic Act, 1854, that the coal and slack they send from their works on the South Staffordshire Railway competes with the similar traffic sent from other works on the same railway to the same places to which they send, and that, having regard to what is done by the railway company in respect of carriage and other services for them and their competitors respectively, their rates are higher in proportion than the rates their competitors are charged, and are an undue prejudice, and that the information they ask for by this summons is necessary to their contention on that complaint. This I think makes them interested in a sense to satisfy the statute.

The other ground of objection is that the 3rd clause of s. 14 does not apply to rates for which traffic is taken to a point beyond that to which the first company's own means of carrying extends. I am not sure, after what Mr. Littler said the other day, that this point still stands to be now considered; but, if it does, I would observe first that a company's rate-book must contain every rate, without exception, for the time being charged to any place to which it books, whether it carries to such place throughout or not: and that as an order under this 3rd clause may be made "as to each rate in such book," it seems clear that

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the rates referred to in the 1st clause are all referred to in the 3rd. It is said that in the case of through rates the first company cannot know how the company working the line, on which the journey is completed, divides its portion of a through rate. But each company must necessarily state what gross sum it requires for its portion of a through route, and it can of course, if it pleases, say what amount this sum includes for carriage, and what, if any, for terminals; and, considering the obligation imposed upon companies by s. 14, as to all rates which they charge for traffic received and booked by them, they are bound, I think, before they adopt a through rate, to insist upon the other companies enabling them to separate it, if required; and I should not therefore allow the objection that they might not be able to furnish the information to prevent our making an order.

Subject therefore to the summons being amended as to "quoting a rate," I think an order for the information asked for in the first paragraph of the summons under s. 14 should be made, and also subject to the same amendment for that asked for in the second. To the latter I understood Mr. Wright to say that he had no objection to urge.

As to the third paragraph of that summons, and as to the whole of the other summons taken out as a proceeding incidental to the application of the 1st March, I agree in what has been said respecting them by Mr. Justice Wills.

First part of summons dismissed without costs, second and third parts of summons and the interlocutory application dismissed with costs.

Solicitors for the applicants: *Capel Cure & Ball.*
Solicitor for the defendants: *C. H. Mason.*

H. D. W.

[IN THE COURT OF APPEAL.]

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June 25, 26.

LANCASHIRE AND YORKSHIRE RAILWAY CO. *v.* ASSESSMENT COMMITTEE OF THE BOLTON UNION.

Local Government Acts—Rural Authority—Powers for lighting District—Order of Local Government Board—Assessment of Railway Company—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 161, 211, 229, 276.

The Local Government Board having made an order under s. 276 of the Public Health Act, 1875, directing that the provisions of the first paragraph of s. 161 (respecting the powers of urban authorities for lighting their districts) should be in force within certain contributory districts of a rural sanitary authority, and that the rural authority should be invested with the powers, &c., of the urban authorities "under those provisions," the rural authority issued their precept under s. 230 for payment of the lighting expenses. A railway company who had property in one of the contributory districts claimed to be assessed at one-fourth only of the rateable value of their property under s. 211:—

Held, first, that the expenses were general, and not special expenses under s. 229:—

Secondly, that on the true construction of the order of the Local Government Board, the rural authority were not invested with the powers of rating of the urban authority, but were only entitled to issue the precept under their ordinary powers: and consequently the railway company must be rated at the full rateable value of their property.

SPECIAL CASE stated under 12 & 13 Vict. c. 45, s. 11. The Bolton Union is a rural sanitary district within the Public Health Act, 1875, s. 5, and the guardians of the poor are the sanitary authority of the district. The township of Great Lever is part of No. 1 special drainage district, which is a contributory place within the said rural district.

On December 11, 1852, the Local Government Board, on application made by the guardians of the poor of the Bolton Union, under s. 276 of the Public Health Act, 1875, published an order as follows: "Until we by order otherwise direct, we hereby declare that the provisions of the first paragraph of s. 161 of the Public Health Act, 1875, shall be in force within the said contributory places of Edgeworth, Entwistle, Longworth, and Quarlton, and within so much of the No. 1 special drainage district as is comprised within the township of Great Lever; and we hereby invest the guardians of the poor of the said union as such sanitary authority as aforesaid, with all the powers, rights, duties, capa-

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bilities, liabilities, and obligations of an urban sanitary authority under those provisions within the said portions of their district."

In pursuance of this order the guardians proceeded to incur expenses in supplying gas and erecting lampposts for lighting the roads and streets in the township of Great Lever.

The guardians treated the expenses so incurred as general expenses within the meaning of s. 229 of the Public Health Act, 1875, and served precepts on the overseers of Great Lever in pursuance of s. 230 of that Act to raise and levy the expenses from the poor-rates of the township as the contribution to the general expenses of the said authority.

On February 1, 1888, the overseers of Great Lever made a rate for the relief of the poor, which included the expenses for lighting, in which they assessed the property of the appellants at about £3523, and levied a rate on it of 2*s.* in the pound. The property of the appellants in the township consisted entirely of land occupied by them as a railway constructed under the powers of Acts of Parliament for public conveyance. The appellants contended that they ought to be assessed under the 211th section of the Public Health Act in the proportion of one-fourth only of the rateable value of their property; and the assessment committee having refused to alter the assessment, this special case was stated to obtain the opinion of the Court on the question whether the appellants were entitled to be rated in respect of the said lighting expenses under s. 211 of the Public Health Act and in proportion to one-fourth only of the net annual value of their occupation. (1)

(1) The principal sections and parts of sections of the Public Health Act, 1875 (38 & 39 Vict. c. 55) referred to in the argument were the following:—

By the first paragraph of sect. 161, any urban authority may contract with any person for lighting the streets, &c., in their district.

Sect. 211: "With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect (namely)

"(1) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property, ascertained by the valuation list for the time being in force, or, if there is none, by the rate for the relief of the poor, subject to the following exceptions, regulations, and conditions (namely)"

* * * *

"(*b*) The occupier of any land used

1889. May 7. The case was argued before the Divisional Court (Field and Cave, JJ.), who held that the appellants were entitled to be assessed on one-fourth only of the rateable value. The assessment committee appealed.

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only as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

Sect. 229: "The expenses incurred by a rural authority in the execution of this Act shall be divided into general expense and special expenses.

"General expenses (other than those chargeable on owners and occupiers under this Act) shall be the expenses of the establishment and officers of the rural authority, ... and all other expenses not determined by this Act or by order of the Local Government Board to be special expenses."

"Special expenses shall be"—certain expenses are then enumerated, but not including the expenses of lighting, "and all other expenses incurred or payable by the rural authority, in or in respect of any contributory place within the district, and determined by order of the Local Government Board to be special expenses.

"Where the rural authority make any sewers, or provide any water supply, or execute any other work under this Act for the common benefit of any two or more contributory places within their district, they may apportion the expense of constructing any such work, and of maintaining the same in such proportions as they think just, between such contributory places, and any expense so apportioned to any such contributory place shall be deemed to be special expenses legally incurred in respect of such contributory place.

"The overseers of any contributory place, if aggrieved by any such apportionment, may, within twenty-one days after notice has been given to them of the apportionment, send or deliver a memorial to the Local Government Board stating their grounds of complaint, and the said Board may make such order in the matter as to it may seem equitable, and the order so made shall be binding and conclusive on all parties concerned.

"General expenses shall be payable out of a common fund to be raised out of the poor-rate of the parishes in the district according to the rateable value of each contributory place in manner in this Act mentioned.

"Special expenses shall be a separate charge on each contributory place."

Sect. 230: "For the purpose of obtaining payment from the several contributory places within their district of the sums to be contributed by them, the rural authority shall issue their precept to the overseers of each such contributory place requiring such overseers to pay, within a time limited by the precept, the amount specified in such precept to the rural authority, or to some person appointed by them, care being taken to issue separate precepts in respect of contributions for general expenses and special expenses, or to make such expenses respectively separate items in any precept including both classes of expenses."

"The overseers shall comply with the

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Henn Collins, Q.C., and *J. K. Bradbury*, for the appellants. The expenses of lighting the township are not special but general expenses within the terms of s. 229 of the Public Health Act. The Local Government Board might have declared them to be special expenses by the order under s. 276, but they have not done so. They cannot therefore be raised or paid as part of the poor-rate. The rural authority are not invested with any of the powers of the urban authority except those mentioned in the first paragraph of s. 161. It follows that they have no power to assess the appellants at one-fourth only of the rateable value of their property under s. 211, which applies only to rates made by the urban authority.

Meadows White, Q.C., and *C. A. Russell*, for the respondents. The question turns upon the construction of the order of the Local Government Board. The effect of that order, although not expressed in distinct words, is to constitute the expenses special expenses within s. 229. The intention of the order was to vest in the rural authority all the powers and authorities which the urban authority had for lighting districts, and place the rural authority in the same position as the urban authority for that purpose. If it had been intended that the rural authority

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requisitions of such precept by paying the contribution required in respect of general expenses out of the poor-rate of their respective parishes, and with respect to special expenses by raising the contribution required, by the levy (in the case of an entire parish on the whole of such parish, and in the case of a contributory place or part of a contributory place forming part of a parish by the levy on such place, or such part thereof, exclusive of the rest of the parish) of a separate rate in the same manner as if it were a rate for the relief of the poor, with this exception (namely)

"That the . . . . occupier of any land used as a railway constructed under the powers of any Act of Parliament for public conveyance, shall, where a special assessment is made for the purpose of such rate, be assessed in respect of one-fourth part only of the rateable value thereof, or where no special assessment is made, shall pay in respect of the said property one-fourth part only of the rate in the pound payable in respect of houses and other property."

Sect. 276: "The Local Government Board may, on the application of the authority of any rural district, declare any provisions of this Act in force in urban districts to be in force in such rural district, and may invest such authority with all or any of the powers, rights, duties, capacities, liabilities, and obligations of an urban authority under this Act."

should proceed to levy the necessary rates under their own powers under s. 230, the order would have been expressed differently; for it not only directs the provisions of the first paragraph of s. 161 to be in force in the particular districts, but goes on to invest the rural authority with all the powers, rights, duties, capacities, liabilities and obligations of an urban authority under these provisions. The rural authority ought, therefore, to assess the rate under s. 211, which directs that the railway company shall be assessed at one-fourth only. It could never have been intended that in urban districts the railway companies should be assessed at one-fourth and in the rural districts at the full value of their property.

Henn Collins, Q.C., for the appellants, was not heard in reply.

COTTON, L.J. The question really submitted to us is this. Out of what fund and by what means the funds to provide for the lighting of this township of Great Lever ought to be provided.

The appellants are the rural authority. The rural authority have certain powers given to them, but not such large powers in many respects as the urban authority. By s. 161 of the Public Health Act, 1875, the urban authority have power to provide for the lighting of streets. Now the rural authority have no power given them by the express terms of the Act—but the Local Government Board has power under s. 276 to give the rural authority any of the powers given by the Act itself to the urban authority, and what they did was this. The Local Government Board made an order, which I shall presently have to read, giving to the rural authority the power to contract for and provide for the lighting of the streets of this particular district. Then of course as the power is given to the rural authority it is necessary that the rural authority should pay, and the only question here is how is that to be provided for. The rural authority has means of providing for the payments which it has to make given to it by the Act. That is by ss. 229 and 230. There is a difference made there between general expenses and special expenses, special expenses being those which either by the Act or any order given by the Local Government Board are

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charged on the particular district. I take it that the general expenses are to be provided for by a claim made on the rating authority. The words are "general expenses shall be payable out of a common fund to be raised out of the poor-rate of the parishes in the district according to the rateable value of each contributory place in manner in this Act mentioned."

Now, it is said that this must be considered as a special expense. It might be made a special expense by the Act itself or by any order of the Local Government Board, but there is no power given by the Act to this rural district to light the streets in any way, and there is nothing in the order of the Local Government Board which makes it a special expense. I should not have been surprised if the Local Government Board had made it so, but in fact they have not. Therefore in my opinion the Local Government Board not having made it a special expense to be borne in a particular way by this district it has become a general expense, and unless there is something else which enables and requires the appellants here to provide for this, in my opinion it must be provided for under s. 229 as a general expense.

What is said here by the respondents is this—that the urban authority has the power of rating, and when by rate there is a provision made for the expenses of lighting, then the railways are to be assessed in a particular way, that is to say, they are to be assessed only in respect of one-fourth of the rateable value. That they claim ought to be done here.

But under the section of the Act which applies only to rates raised by the urban authority, the rural authority have no power whatever, and there is nothing in the Act which enables the rural authority, to raise money required to pay for this lighting in the way pointed out, and in which the respondents say they ought to be able to raise it. How is it to be done? It was said here, and this was the only intelligible argument, that the order of the Local Government Board gave power to the rural authority to light this district, and by so doing gave it the power which the urban authority had to raise the money required by rating, and thus the rate would be subject to the provisions of s. 211 of the Act. Now is that so? That simply turns on the

question of what the order is. The order is in these terms: "Until we by order otherwise direct, we hereby declare that the provisions of the first paragraph of s. 161 of the said Public Health Act, 1875, shall be in force within the said contributory places." I need not read those provisions. This part of the order is clear. It gives to the rural authority such power as the urban authority has under s. 161—the first paragraph—which is only this "Any urban authority may contract with any person for the supply of gas or other means of lighting the streets, markets, and public buildings in their district, and may provide such lamps, posts, and other materials and apparatus, as they may think necessary for lighting the same."

Then reliance was placed on the latter part of the order of the Local Government Board: "We hereby invest the guardians of the poor of the said union, as such sanitary authority as aforesaid with, all the powers, rights, duties, capacities, liabilities and obligations of an urban sanitary authority." Now what are they?—"under those provisions," that is under the provisions of paragraph of s. 161 which I have read. There is nothing in that paragraph which in any way provides for the way in which that money is to be raised. It is true that if the lighting is done by the urban sanitary authority under the provisions of s. 161, they have the means of raising the money by making a rate, and then the assessment is to be in accordance with s. 211; but the rural authority have a different way of providing for any expenses which they may incur for work which they are authorized to do, and in my opinion "under those provisions" cannot in terms give and cannot impliedly give to the rural authority the power of making a rate, and then give the railway company the benefit of the provisions of s. 211, which requires them to be rated only for one-fourth of their rateable value. It is said this is very hard. The question is what has the Act of Parliament done, and what has the Local Government Board done? The Local Government Board, I have no doubt, properly considered whether it was right to give the rural sanitary authority in these particular portions of its district, the power to light the streets. If they had thought fit they might, under s. 276, have given the rural authority the power to make a rate and have imported not

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only the power of making a rate but the provisions of s. 211. They have not done it. We cannot do it. Where power is given by the Act, without any consideration for special circumstances, for the urban authority to light the streets and incur the expense of doing so, there is this provision, that it is to be raised in the way I have mentioned, giving railway companies and other persons a certain relief from the liability which they incur as regards the rating. If the Local Government Board when they considered whether they should give these powers to the rural authority had seen fit to say that there should be this provision inserted, and that the money to pay for the lighting should be raised in this particular way, then I do not know that it is at all unreasonable that the railway company should be relieved in the way in which they are by s. 211; but it should not be necessarily inferred that the relief must be given them, when after considering all the circumstances the Local Government Board, although it gave the power to the rural authority to light the streets, did not provide that the sum for doing that should be raised in any other way than the way in which it is raised by the rural authority.

In my opinion we must make a declaration contrary to the order which was made by the Divisional Court, and we must answer the question that is put to us in this way, that the present respondents are not entitled to be rated in respect of the said lighting expenses under s. 211 of the Public Health Act.

In my opinion the appeal succeeds, and we must reverse the decision of the Court below.

FRY, L.J. As I have the misfortune to differ from the view taken in the Court below, it is necessary that I should state my grounds for the view which I take in this case.

In my opinion the question really turns upon the construction of the order made by the Local Government Board on December 11, 1882. To consider what the true construction of that order is, I must shortly indicate the scope of the Act. The Act gives certain general powers to two kinds of authorities—to urban sanitary authorities and to rural sanitary authorities. One of the powers which it gives to an urban sanitary authority is the one contained in the 161st section—a power to contract for the

supply of gas, and other matters incidental to that power. Part VI. of the Act deals with rating and borrowing powers, and that is divided into two groups of sections, the one dealing with expenses of urban authorities and the urban rates, and the other with the expenses of rural authorities. The general scope of the first group is this, that it provides for a general district rate, and for private improvement rates and the highway rate. It constitutes, therefore, the urban sanitary authority a rating power. It is quite true that the general district rate is subject to certain special provisions which make the incidents of that rate different from the incidents of a poor-rate. The expenses of rural authorities are divided into two classes: the general expenses and the special expenses. Under general expenses are all expenses other than those mentioned in the sections and determined by this Act or by order of the Local Government Board to be special expenses. Then comes the 276th section, which enables the Local Government Board to declare that any of the provisions of the Act which relate to the urban authorities shall be in force in some rural districts or contributory places—to apply it, therefore, in the whole or any part of the area of a rural authority, and to invest the rural authority with any of the powers, rights, duties, capacities, liabilities, and obligations of an urban sanitary authority under the Act. That being the general scheme of the Act, what the Local Government Board did in this case was to make the order under the power given by the 276th section. By that they directed that the provisions of the first paragraph of s. 161 of the Public Health Act, 1875, should be in force in the contributory places there mentioned. Now the first paragraph of s. 161 is the one which gives the power of lighting with gas. The part of the Act which remains in force, therefore, with regard to the contributory places in question is indicated in the most direct manner. It is pointed out by metes and bounds, so to speak. It is the first paragraph of the particular section, and nothing more. Then the order goes on to provide that the Local Government Board invests the guardians of the poor of the said union, as the sanitary authority, with all the powers, rights, duties, capacities, liabilities, and obligations of the urban sanitary authority under those provisions within the portions of their district

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—that is to say, it invests them with the power in the first paragraph of s. 161, and nothing more. It appears to me that the construction of that is plain. The order enables the rural sanitary authority to exercise the power of that first paragraph of s. 161: it enables them to contract for gas; it enables them to put up lamp-posts. But then it leaves the general provisions of the Act with regard to the expenses of a rural authority to take effect. No doubt it would have been competent for the Local Government Board to have clothed the rural authority with the powers of making a general district rate under s. 229, but it did not do it; consequently it left the expenses, and the power which was to be exercised by the rural authority, to fall under the general provisions with regard to the expenses of the rural authority. As I have already shewn, those expenses are divided into two classes; they are either general or special expenses. The expenses in question are not special expenses within the definition of those expenses contained in s. 229. They have not been made special expenses by any order of the Local Government Board. Consequently they are general expenses, and to be borne in the manner which general expenses are to be borne. It is said that the hardship of that conclusion is so apparent that we ought to approach the reading of the order with a benevolent mind towards the case of the respondents. It is said to be inconceivable that, whereas if the lighting had been done by an urban sanitary authority, the railway would only be taxed to the extent of one-fourth of the rateable value, if the lighting has to be done by a rural authority, it should be taxed as in the case of poor-rates. That is a point which depends upon the circumstances of the case, of which we have no knowledge, and which undoubtedly deserved the attention, and I doubt not received the attention, of the Local Government Board before they made the order. It was competent to them to have introduced those provisions which relate to the general district rate, but they did not. We cannot force the plain language of the order in order to give effect to the supposed equity, which, for all I know, has no existence.

I think, therefore, the order must be varied in the manner suggested by the Lord Justice.

LOPES, L.J. The judgments which have been delivered have so fully gone into the case, that I can in very few words express my view.

The expense in question is not a special expense. The Local Government Board have not made it a special expense. It is, therefore, a general expense. But then it is said that it is covered by this order to which reference has been made. That entirely depends upon what the true construction of that order is. In my mind the construction of that order is clear. It puts in force the first paragraph of s. 161, and no more. I think it puts nothing more in force, and if any reliance is placed upon the words "powers, rights, duties, capacities, liabilities and obligations," it makes it clear that when we see the following words, "under those provisions," they refer beyond all question to the provisions in the first paragraph of s. 161. Therefore, in my opinion, it does not give the rural authority power to make a rate. I think, therefore, that we must answer the question we have been asked in this case in the negative.

In my opinion the decision of the Court below was wrong, and the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Clarke, Woodcock & Ryland, for C. Moorhouse, Manchester.*

Solicitors for respondents: *Holden & Holden, Bolton.*

M. W.

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July 1, 5.

[IN THE COURT OF APPEAL.]

CARPENTER *v.* DEEN.

Bill of Sale—Schedule—Inventory—Personal Chattels—Description—After-acquired Property—Keeping up Security—Implied Covenant—Collateral Security—Life Policy—"Defeasance or Condition"—Registration—Bills of Sale Act, 1878 (41 & 42 *Vict c.* 31), *s.* 10, *sub-s.* 3—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.

By a bill of sale registered under the Bills of Sale Act (1878) Amendment Act, 1882, the grantor assigned, as security for a loan, "all and singular the several chattels and things specifically described in the schedule thereto annexed." The schedule described the chattels as "21 milch cows" on a farm belonging to the grantor, "and all goods, chattels and effects in or upon the premises belonging to" the grantor. As collateral security the grantor deposited with the grantee a policy of assurance on his life. There was no memorandum of the deposit, and the policy was not referred to in any way in the bill of sale. After the execution of the bill of sale the grantor sold several of the cows referred to in the bill of sale and bought others:—

Held, by the Court of Appeal (Cotton, L.J., Fry, L.J., and Lopes, L.J.), affirming the judgment of Charles, J., first, that the policy of assurance, being merely a collateral security, was not a "condition or defeasance" requiring registration as part of the bill of sale under s. 10, sub-s. 3, of the Bills of Sale Act, 1878: secondly, that as the bill of sale contained no covenant, either express or implied, affecting after-acquired property, it did not extend to any of the stock brought on to the farm after the date of the bill of sale; and (reversing the judgment of Charles, J.) thirdly, Lopes, L.J., dissenting, that the words "21 milch cows" were not such a specific description of the chattels intended to be comprised in the bill of sale as to satisfy the requirements of s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882.

Witt v. *Banner* (20 Q. B. D. 114) distinguished.

APPEAL from a judgment of Charles, J., on an interpleader issue in which the plaintiff, the grantee of a bill of sale, claimed certain goods which had been taken in execution at the suit of the defendant. The bill of sale was dated December 8, 1887, and was made between Elizabeth Wilmshurst and William Samuel Wilmshurst, wife and husband, carrying on the business of cow-keepers and dairymen at Glenley House, Eastbourne, Sussex, and Greenrise Farm, Longley, Sussex (thereinafter called "the mortgagors"), and the Charing Cross Bank, of which the plaintiff was the sole proprietor. In consideration of 200*l.* then paid to the mortgagors by the bank, the mortgagors thereby

assigned to the bank the chattels specifically described in the schedule thereto annexed, and then being in and about the premises, by way of security for the payment of 200*l.* and interest. The deed contained no express covenant by the mortgagors for replacing any chattels lost or destroyed, or for making any chattels subsequently brought on to the premises part of the security.

A schedule to the deed was annexed containing particulars of the furniture at Glenley House, and further particulars in the following terms:—

"Greenrise Farm, Longley, and stables at back of Glenley House, Sussex:

"21 milch cows; bay mare 'Polly,' 6 years old; bay mare, 'Peggy,' aged 4;" (then followed particulars of certain dairy utensils and implements) "and all goods, chattels and effects in or upon the premises belonging to us."

The bill of sale was duly registered under the Bills of Sale Act (1878) Amendment Act, 1882.

About the date of the execution of the bill of sale W. S. Wilmshurst deposited with the bank, as further security for the loan, a policy of assurance on his life for 400*l.*, but the deposit was not accompanied by any letter or memorandum, nor was it in any way referred to in the bill of sale.

On November 14, 1888, the defendant recovered judgment against the mortgagors for 78*l.* Execution was issued, and the sheriff took possession of the goods on the premises of the mortgagors.

It appeared that subsequently to the execution of the bill of sale the mortgagors sold several of the "milch cows" referred to in the schedule and bought other milch cows and also two heifers, and that only two or three of the milch cows taken in execution were on the farm at the date of the execution of the bill of sale.

The learned judge gave judgment for the plaintiff.

The defendant (the execution creditor), appealed.

G. A. Bonner, (*H. F. Dickens* with him), for the defendant. First, the bill of sale did not affect any cows which were subse-

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quently to its execution acquired by the grantors and brought on to the farm, certainly not the two heifers. The bill of sale contained no clause providing that after-acquired property should be included in the security.

Secondly, the description "21 milch cows" in the schedule to the bill of sale is not such a specific description as is required by s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882; and therefore, such chattels not being "specifically described," the bill of sale is, under that section, void, so far as regards those chattels: *Witt* v. *Banner*. (1)

[LOPES, L.J., referred to *Roberts* v. *Roberts*. (2)]

The cows should have been identified by name, mark, colour, age, or breed, as in an ordinary business inventory or sale catalogue. The description "21 milch cows," does not indicate with sufficient particularity what the holder of the bill of sale might seize.

Thirdly, the policy of life assurance was in the nature of a "defeasance or condition," and, as such, part of the bill of sale, and not having been embodied in and registered as part of the bill, the registration of the bill itself is void under s. 10, sub-s. 3 of the Bills of Sale Act, 1878: *Counsell* v. *London and Westminster Loan and Discount Company*. (3)

A. R. Cluer, for the plaintiff, was only required to argue the first two points. The cows acquired subsequently to the date of the bill of sale were included in it. It is true that there is no express covenant that chattels subsequently brought in to replace any sold or destroyed shall be deemed part of the security, but such a covenant or obligation should be implied as being necessary for the maintenance of the security: *Furber* v. *Cobb*. (4)

As to the second point, that of specific description, the case is governed by *Roberts* v. *Roberts* (5), where the description "7 milking cows" appears to have been deemed sufficient.

[FRY, L.J. The question as to whether that was a sufficient description does not appear to have been raised or argued in that case.]

(1) 20 Q. B. D. 114.
(2) 13 Q. B. D. 794, 806.
(3) 19 Q. B. D. 512, 515.
(4) 18 Q. B. D. 494.
(5) 13 Q. B. D. 794, 799.

It is not necessary for identification that the cows should be known by name or colour, nor is it necessary that the bill of sale should refer to them by every possible description. It is sufficient if they are described as ordinary business men conversant with such matters would describe them. The assignment in the bill of sale was in terms sufficient to carry all the grantors' farming stock.

Bonner, in reply.

Cur. adv. vult.

COTTON, L.J. This is an appeal from a decision of Charles, J., on an interpleader issue, and the matter in contest is the validity of a bill of sale. Several objections have been taken to the bill of sale. With the bill of sale was given, as further security, a policy of life assurance; and one objection was that this policy ought to have been registered as a defeasance under s. 10, sub-s. 3 of the Bills of Sale Act, 1878, which says that "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

In my opinion that objection cannot prevail. This is not a "defeasance" within the terms of that provision. It is true that if the money produced by the policy of assurance were applied in payment of the debt that would put an end to the bill of sale, but this is not what is pointed at by the section to which I have referred. A case of *Counsell* v. *London and Westminster Loan and Discount Co.* (1) was cited, in which it was held that a promissory note given with the bill of sale was a defeasance which, not being contained in the body of the bill of sale or written upon the same paper, rendered the registration of the bill of sale void: but in that case the two instruments, taken together, contained the actual terms of the loan between the parties. The promissory note was in fact a defeasance, because,

(1) 19 Q. B. D. 512.

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if the whole sum payable on the note were paid, the rights of the bill of sale holder would cease. It was a contract between the parties containing terms upon which the contract created by the bill of sale would come to an end. The present case is entirely different. In that case Lindley, L.J., said, "I am of opinion that the promissory note constitutes a defeasance within s. 10 (of the Bills of Sale Act, 1878), and that as the promissory note is neither contained in the body of the bill of sale, nor written on the same paper, the bill of sale is bad." And the Lord Justice states what is the effect on a bill of sale of a promissory note of that kind.

Then there was a further objection, founded on the bill of sale itself. It appears that the property in the beasts sold, or the greater part of them, was not the property of the grantors when the bill of sale was executed; and it is said, therefore, that these beasts cannot pass, and the bill of sale cannot have any effect as to them. In my opinion that is so. There is nothing whatever in this bill of sale which can in any way include the property in these beasts, even though they were bought in substitution for any of those which were originally included and afterwards sold.

Reliance was placed upon a case of *Furber* v. *Cobb* (1); but in that case there was a covenant by the grantor to replace any of the articles comprised in the bill of sale which should be destroyed or worn out, and that was held to give effect to the bill of sale as against those articles with which the grantor might, under the covenant, replace those lost or destroyed. It was said that the covenant was really one to keep up the security, and that it was justified by the Bills of Sale Act (1878) Amendment Act, 1882, as being a covenant necessary for maintaining the security; but there is no such covenant here. It is said it is to be implied. As to the cows there can be no implication that if they die they are to be replaced. The bill of sale can have no operation as to those beasts which are shewn not to have been the property of the grantors at the time the execution took place. The assignment is of "milch cows." Two of those which were sold under the bill of sale were heifers and cannot be held to

(1) 18 Q. B. D. 494.

have been included in the description, described as "milch cows," at the time when the bill of sale was executed. Other cows were bought by the grantor, after the bill of sale was executed, in substitution for others, but still they were not included in the bill of sale. Therefore the bill of sale cannot apply to or carry those beasts.

Now I come to an objection of a more serious and difficult nature to deal with. It is said that there is not in the schedule to the bill of sale such a description of these cows as is required by the statute. The assignment is of "all and singular the several chattels and things specifically described in the schedule hereto annexed, and now being in and about the dwelling-house and premises known as Glenley House, Eastbourne, in the county of Sussex, and at Greenrise Farm, Longley," in the same county. It is stated that this was to cover all the farming stock, including the cows, besides all other the goods and chattels in the schedule. The 4th section of the Bills of Sale Act (1878) Amendment Act, 1882, requires that "every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, as against the grantor, in respect of any personal chattels not so specifically described." There must, according to that section, be an inventory in the schedule, and in that schedule there must be a specific statement of the chattels the bill of sale is to affect. Without going into a definition of the words "specifically described," it appears to me that the meaning of the section is that there must be such a description in the schedule of the chattels described in the bill of sale as that they may be identified; that each chattel shall be described in such a way as to enable a person dealing with the grantor of the bill of sale to identify that which is intended to pass. Here the description is, "Greenrise Farm, Longley, and stables at back of Glenley House, Sussex: 21 milch cows"; and then there are other things more fully described, so that they may be identified: "Bay mare 'Polly,' 6 years old: bay mare 'Peggy,' aged 4."

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I am of opinion that "21 milch cows" is not a sufficient description within the provisions of the statute, and that, whatever the consequences may be, we cannot help it. The statute has said that that only can be affected by and comprised in the bill of sale which is mentioned in the schedule and "specifically described" in the schedule; that is to say, described in such a way as to enable the articles comprised in the bill of sale to be identified, and not to leave any doubt whatever about their identity. The case might have been different if the schedule had said "all the beasts on the farm, consisting of twenty-one milch cows," because then there would have been something by means of which the cows might have been identified; but here the words are, simply, "21 milch cows," and it does not appear that there were not on the farm at the time other milch cows besides: and if so, who is to ascertain which milch cows were comprised in the bill of sale, or to say how are they to be identified? Then there is a difficulty on the evidence in ascertaining what cows were on the farm at the time, and what have since been bought. I will not say what is a sufficient description, or what description is required in order to comply with the words of the statute; because here the description is so indefinite that it is impossible to say that the cows intended to be comprised in the bill of sale are described in such a way as to enable them to be identified, or to enable one to say whether or not what is claimed under the bill of sale is comprised in it. That, in my opinion, is a fatal objection.

Then it was said that a description of this kind had lately been passed and approved by the Court of Appeal. If that is so, I should follow the decision, but *Roberts* v. *Roberts* (1), the case which was relied upon, was decided without the attention of the Court having been called to the particular description. In that case there were included in the schedule "2 cart-horses, 2 cart mares, 1 pony, 2 colts, 7 milking cows," and so on. It is very true, there seems to have been no objection whatever raised as to these cows. It appears they were included among the goods and chattels which had been sold, and about some of which the question in the case arose; but the attention of the Court was never

(1) 13 Q. B. D. 794.

in any way called to the point as to whether the description "7 milking cows," was sufficient, and no question whatever was raised about it.

Then the case of *Witt* v. *Banner* (1) was referred to as the nearest to the present. That case lays down the principle as I have already stated it. There the description in the schedule to the bill of sale was "Four hundred and fifty oil-paintings in gilt frames," and of a certain number of water-colour drawings in gilt frames also. That was much more of a specific description by which the things could be identified than the description here; but the Court held that that was a bad description. I agree that what description may be given and is required must depend upon the nature of the articles; but I see no difficulty whatever in giving some more precise description of these "21 milch cows." They might have been identified by breed or colour, or they might have been described as either horned or polled: there are various other ways in which they might have been described. In *Witt* v. *Banner* (1) the Court of Appeal, when the matter came before them, did decide that a more specific description was required: and so in the present case, it seems to me that there should have been a more specific description—a description which would have more specifically denoted the articles intended to be assigned than the description which was given.

On these grounds, therefore, I am of opinion that the decision of Charles, J., must be reversed and the appeal allowed.

FRY, L.J. I am of the same opinion. Upon the first point, namely, whether the collateral security has affected the validity of the bill of sale by reason of its not being mentioned in the bill of sale, I agree with the Lord Justice. The question is, is a collateral security a "defeasance or condition, or declaration of trust not contained in the body" of the bill of sale, within the meaning of s. 10, sub-s. 3 of the Bills of Sale Act, 1878? It cannot be contended that this is a "condition or declaration of trust." What is suggested is, that it is a "defeasance." In my opinion no defeasance is created by it at all. The defeasance, if any, is created by the bill of sale. A collateral security is merely

(1) 20 Q. B. D. 114.

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a mode of further securing payment. A case has been pressed upon us, namely, that of *Counsell* v. *London and Westminster Loan and Discount Co.* (1), where the Court came to the conclusion that the security comprised a form of defeasance not contained in the bill of sale. That does not cover the present case.

As to the question whether the bill of sale comprises other and after-acquired property, I have nothing to add to what has been said by the Lord Justice. On that point the appellant's contention appears to be without any foundation.

Then we come to the other more important question, namely, what is the meaning of the 4th section of the Bills of Sale Act (1878) Amendment Act, 1882? It is a precise and particular clause; it says this: "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."

It is to be observed that the statute requires that the enumeration of the chattels shall not be in the body of the instrument, but in the schedule; and that that schedule shall contain an inventory. That inventory is to contain a specific description of the chattels. In considering what is the meaning of the words "specifically described," I do not think we have any occasion to enter into a discussion of the meaning of the word "specifically." It seems to me that we should look at the scope and object of the section. They are, in my opinion, plain. I think they are to facilitate the identification of the articles enumerated in the schedule with those that are to be found in the possession of the grantor: that is to say, to render the identification as easy as possible and to render any dispute as to the intention of the parties as rare as possible, and to shut the door to fraud and controversy, which almost always arise when general descriptions are used. That is to be done as far as possible; by which I mean, so far as is reasonably possible—so far as a careful man of business, trying to carry the object of the Act into execution, could

(1) 19 Q. B. D. 512.

and would do without going into unreasonable particulars. That is what the Act requires. The necessary description would differ in various cases. Suppose the owner of twenty or thirty wild ponies on Exmoor were to comprise them in a bill of sale: I do not suppose it would be necessary to give an exact description of every one of those small creatures; but if the schedule comprised six valuable race-horses, I think one would expect, and rightly expect, a more exact description of the animals, and greater assistance in the identification of them. The same observations would apply to horned cattle. For cattle on the hills a general description would do; but if a man had three or four short-horns with valuable pedigrees, I think one would require particularity in their description. The meaning of the Act is that you must take reasonable care in the description of the subject-matter in the schedule. Now has that been done in this case? The schedule begins with enumerating household furniture at Glenley House, and then proceeds to mention two distinct places, "Greenrise Farm, Longley, and stables at back of Glenley House, Sussex"; and in those two distinct places are stated to be "21 milch cows; bay mare 'Polly,' 6 years old; bay mare 'Peggy,' aged 4."

One would really expect from this description that the twenty-one milch cows were on Greenrise Farm, and that the two bay mares were in the stables at Glenley House; but, whether that is so or not, there is no attempt to distinguish which of the two classes of property there enumerated are in the one place or in the other. Again, there is no attempt to differentiate these cows from others, except by describing them as "milch cows," which are, obviously, a very large class of cows. I will not lay down what the grantors of this bill of sale ought to have done in the way of identification. In my opinion they have really done nothing: accordingly they have failed to comply with the 4th section of the statute.

There are only two cases on the subject to which I will refer. One is *Witt* v. *Banner* (1), which appears to be in accordance with the view we now take; and the other is *Roberts* v. *Roberts* (2), which is said to be a decision in favour of the respondent. But

(1) 20 Q. B. D. 114. (2) 13 Q. B. D. 794.

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in that case it seems to me that the question as to whether the "7 milking cows" had been sufficiently described could not have been raised, because the only question was about a sum of 40*l.*, the value of the "household furniture and effects" comprised in the bill of sale; so that the other point, it seems, was not in controversy in the case; but whether it was so or not, it was, at all events, not decided.

LOPES, L.J. With regard to the first point, which I will call the "defeasance" point, and the other, which I will call the "after-acquired property" point, I have nothing to say, because I agree with the judgments that have been delivered. But, with regard to the point which arises as to the meaning of the 4th section of the Bills of Sale Act (1878) Amendment Act, 1882, I regret that I must come to a conclusion different from that of the other members of the Court.

The section requires that the chattels shall be "specifically described." According to my view, that means, described with such particularity as is used in an ordinary business inventory of such chattels. I agree with the observations of Lindley, L.J., in *Roberts* v. *Roberts* (1), where he says: "It is enacted in s. 4 that every bill of sale 'shall have effect only in respect of the personal chattels specifically described in the said schedule.' What specific description is sufficient? A mere general description is not enough; there must be an inventory describing the chattels as business men would describe them: without going into minutiæ, it seems to me that it would be sufficient to state the nature of the articles and the number of them, for instance, twenty chairs, five tables."

Now, it seems to me that what would be a sufficiently specific description as applied to one subject-matter would not be a sufficiently specific description as applied to another. Here, the description which is complained of is, "21 milch cows." Now these cows, as I understand, were ordinary cows, and not pedigree cows, or cows of some special breed; and, I apprehend, that the proper way to describe them, was the way in which an ordinary business man, having to deal with such things, would describe

(1) 13 Q. B. D. 794, 806.

them. It is said that to describe them as "21 milch cows" is not a sufficiently specific description of them. I am at a loss to know how they could be otherwise described, and I have heard no rule laid down upon the subject. Is it to be said that they are to be described by colour? All I can say is, that I do not believe that is the usual way of describing cows of that class among business men. Is it to be said that they are to be described by name? Again, I say that is not the ordinary way of describing them; because I think it is common knowledge that, where there is a large dairy of cows, it is not usual, and, as it seems to me, it would be ridiculous, for any man possessing such a dairy to suppose that his cows had any particular names. It is different from the case of a man having a few pet cows. Again, with regard to colour, great difficulty would ordinarily be found in describing cattle in that way. Take, for example, Devonshire cattle; they are all red. Taking the case of sheep, that is different. There, those who know anything of farming know this, that there is some mode of describing sheep. You describe your lambs as "ewe lambs," or "wether lambs;" or, you describe your sheep as "two-tooth," or "four-tooth," or "six-tooth," or as "broken mouthed;" and therefore describing your sheep as "100 sheep," simply, without condescending to particulars such as those to which I have alluded, would not be sufficient.

Again, with regard to horses, the case is probably different to the present. It is usual to describe horses by colour, such as a "chestnut" mare, or gelding, or a "grey" mare, or a "roan-grey" mare, or in some such way as that.

Lindley, L.J., in the passage from his judgment, to which I have referred, thought that the description of "twenty chairs" would be sufficient. I might go a little further than that. Supposing the description were thus,—"21 dining-room chairs;" would that not be sufficient? Would it be necessary to say, so many "with oak backs and red leather seats," and so many "with mahogany backs and leather cloth seats." In my opinion those are details not contemplated by the section. It amounts to this, that the specific description required by the section is such a specific description as will be sufficient to enable any one

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desiring to make the distinction to distinguish the articles assigned by the bill of sale from other articles of the same class.

In *Roberts* v. *Roberts* (1), no doubt the words "7 milking cows" in the bill of sale in contest in that case would have been sufficient to cover this case if the decision had rested on that ground, but the decision did not rest on that; accordingly, that case does not apply.

Another case cited was *Witt* v. *Banner* (2), where the description was "four hundred and fifty oil-paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames;" and that was held not to be a specific description within the Act. With that I should agree. I do not think that decision militates against the view I have taken of this case—and for this reason: I do not think that is the way in which a business man conversant with such matters, and desirous of ear-marking those articles, would describe them. Such a man would describe them as "portraits," or, as so many "landscapes," or probably landscapes of particular places, or would use other descriptions indicating the particular subjects represented by the pictures. It seems to me that is the way they would be described. That case appears to be thus distinguishable from the present, and in my view, the description in this case is a sufficient description within the meaning of the 4th section of the Act.

Appeal allowed.

Solicitors: *Champion & Sons*; *C. E. R. Preston.*

G. I. F. C.

(1) 13 Q. B. D. 794.

(2) 20 Q. B. D. 114.

[IN THE COURT OF APPEAL.]

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July 25, 26, 29.

THE COMMISSIONERS OF INLAND REVENUE *v.* G. ANGUS & CO.
THE SAME *v.* J. LEWIS AND SONS.

Revenue—Stamp—Ad valorem Duty—"Conveyance on Sale"—Agreement for Sale of Goodwill of Business—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *Sched. and s.* 70.

The schedule to the Stamp Act of 1870 imposes an ad valorem duty on every "conveyance or transfer on sale of any property."

By s. 70 "The term 'conveyance on sale' includes every instrument . . . whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser":—

Held, affirming the judgment of the Queen's Bench Division, that an agreement for the sale of the goodwill of a business, the effect of which in equity, as between the vendor and the purchaser, was to make the purchaser the owner, and of which a Court of Equity would have decreed the specific performance in the event of the vendor not fulfilling his contract, was not within s. 70, and was not, therefore, liable to ad valorem duty under the Act.

APPEAL by the Commissioners of Inland Revenue against a decision of a Divisional Court (Lord Coleridge, C.J., and Hawkins, J.) that certain instruments were not liable to ad valorem stamp duty under s. 70 of the Stamp Act, 1870.

The questions arose upon cases stated by the Commissioners of Inland Revenue under s. 19 of the Act.

In the case of Angus & Co. the facts as stated were as follows:—

By an agreement made May 10, 1888, between G. Angus & Co. (Limited), and J. H. Angus and W. M. Angus, the liquidators thereof, and G. Angus & Co. (Limited), it was agreed (inter alia) as follows—

1. That the old company and its liquidators should sell and the new company should purchase the freehold lands, buildings, and hereditaments, and the goods, chattels, &c., of the old company, and the undertaking, business and goodwill thereof, and all other the real and personal property of the old company, &c.

Clauses 2 and 3 specified the consideration to be paid for the transfer of the business from the old to the new company.

By clause 5 the new company was "to accept without investi-

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gation such title as the old company had to the real and personal property and premises agreed to be sold."

By clause 6 the old company and its liquidators should as soon as conveniently might be execute and do at the expense of the new company all such assurances and things as should be reasonably required by the new company for vesting in it the said property agreed to be sold or any part thereof and giving to it the full benefit of the agreement.

By clause 9 "these presents are intended to operate as an agreement only, and not as a conveyance, transfer, or assignment."

The agreement was signed by the two liquidators, and sealed with the common seals of both companies.

The instrument was presented, stamped with the stamp duty of 10*s.*, on behalf of the purchasing company to the Commissioners of Inland Revenue, under s. 18 of the Stamp Act, 1870, for their opinion as to the amount of stamp duty with which the instrument was chargeable. The Commissioners were of opinion, having regard to the terms and operation of the instrument, and to s. 70 of the above Act, that, as respected the goodwill referred to in clause 1 of the instrument, the instrument was chargeable, under the head "conveyance" in the schedule to the Act, with 456*l.* 10*s.*, being ad valorem duty at 5*s.* for every 50*l.* of 91,266*l.* 3*s.* 7*d.*, which was stated on behalf of the company as the price or value of the goodwill, and the Commissioners were also of opinion that, having regard to s. 8 of the Act, the instrument was also chargeable under the head in the schedule "Deed of any kind whatsoever not described in the schedule" with the further duty of 10*s.* in respect of its operation as a deed relating to other matters distinct from the transfer of goodwill above referred to. And the Commissioners assessed the duties payable on the instrument accordingly.

In the case of J. Lewis & Sons the facts as stated were as follows:—

By agreement of May 14, 1888, between James Lewis and Arthur Hornby Lewis, therein called the vendors, and James Lewis & Sons, Liverpool Copper Wharf Company, Limited, it was (inter alia) agreed as follows: that the vendors should sell and the company should purchase the business of the vendors

and all the property and assets of the business, as the same existed on January 1, 1888, at the price of 80,000*l.* payable as thereinafter mentioned.

By clause 8 it was provided that the purchase should be completed on July 1, 1888, and the company should be entitled to possession of the business and property as from January 1, 1888, and should be deemed to have accepted the title to the property, and should pay all costs and expenses of the vendors and purchaser of and incident to any assurances and acts required for the completion of the purchase, &c.

Upon this agreement, which was signed by the vendors and sealed with the seal of the company, and which bore an ordinary 10*s.* deed stamp, being presented to the Registrar of Joint Stock Companies for the purpose of being filed in compliance with the provisions of s. 25 of the Companies Act, 1867, the registrar took the objection that it was not properly stamped, and refused to file it.

The Commissioners (whose opinion was required under s. 18 of the Stamp Act, 1870) expressed their opinion that this instrument was chargeable as a "conveyance or transfer on sale," with an ad valorem duty of 337*l.* 10*s.*, being at the rate of 5*s.* for every 50*l.* of the sum of 67,500*l.*, the amount which the solicitors of the company stated to be the purchase price of the goodwill of the business, and also with the duty of 10*s.* as a deed relating to matters distinct from the transfer in respect whereof the ad valorem duty was chargeable. The company appealed to the Queen's Bench Division against this decision.

Upon cases stated by the Commissioners under s. 19, in the Divisional Court the case of Lewis & Sons was argued first, and was treated as governing that of Angus & Co.; in the Court of Appeal the case of Angus & Co. was argued first, and was treated as governing the other.

April 3. *Phipson Beale, Q.C.*, and *Joseph Walton*, for J. Lewis & Sons.

Meadows White, Q.C., and *Warrington*, for Angus & Co.

Sir E. Clarke, S.G., and *Dicey*, for the Commissioners, in both cases.

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[The following cases were cited: *Potter* v. *Commissioners of Inland Revenue* (1); *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (2); *Marquis of Chandos* v. *Commissioners of Inland Revenue* (3); *Horsfall* v. *Hey* (4); *Wolverhampton and Walsall Ry. Co.* v. *London and North Western Ry. Co.* (5); *Rayner* v. *Preston* (6); *In re Maughan* (7); *Walsh* v. *Lonsdale.* (8)]

1889. April 8. HAWKINS, J. (after stating the provisions of the agreement in the case of Lewis & Co.), continued: The question is, whether upon that agreement the stamp duty ought to be an ad valorem stamp upon the purchase-money, or whether the instrument would be sufficiently stamped if the ordinary deed or agreement stamp is placed upon it. Clearly, it must be a deed stamp, because the instrument is a deed under seal, and that stamp must be affixed.

The question turns upon s. 70 of the Stamp Act, 1870, which gives the interpretation to be placed upon the expression "conveyance on sale" in the following language: "The term 'conveyance on sale' includes every instrument and every decree or order of any Court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction;" the important words are, "every instrument by which any property upon the sale thereof is legally or equitably transferred." If the property is legally or equitably transferred by the instrument to which a stamp ought to be affixed, then, no doubt, an ad valorem duty ought to be paid upon an agreement, but if by an instrument no property is legally or equitably transferred, then it falls within the ordinary denomination of deeds and is simply to be stamped with an ordinary stamp, and no ad valorem duty would be payable until after the conveyance was actually made in pursuance of the agreement. The question is, whether this agreement can be said to convey or transfer any legal or equitable interest. The substance of the argument addressed to us is this: that by the contract of sale, having

(1) 10 Ex. 147.
(2) Law Rep. 7 Ex. 211.
(3) 6 Ex. 464.
(4) 2 Ex. 778.
(5) Law Rep. 16 Eq. 433.
(6) 18 Ch. D. 1.
(7) 14 Q. B. D. 956.
(8) 21 Ch. D. 9.

regard to the form of it set forth in this agreement, although there was no legal title to the property mentioned in the agreement actually conveyed, yet, nevertheless, that there was an equitable interest in the property conveyed; and we had a variety of cases cited for the purpose of establishing that proposition. We are of opinion that that proposition is not established by the authorities which have been cited to us, and that it is not necessary that this agreement should be stamped with the ad valorem duty. It is true that, having regard to the language of the agreement (indeed the same might be said of all agreements for purchase and sale), it gives to the purchaser, the vendee of the property which is contracted to be sold, an equitable right to insist upon having a conveyance made to him when all the conditions precedent which are to be observed on the part of the vendor have been fufilled.

There is, I think, a great distinction between having an equitable right and a legal right to insist upon having a conveyance when certain things have been performed which were not performed, but which had to be performed in the future, at the time of signing the agreement, and the legal and equitable interest being conveyed by the instrument when everything that is to be done has still to be done; the purchase-money paid, and all conditions fulfilled at the time when the parties enter into the arrangement. I can thoroughly understand that in a case where the assignment says, "Whereas an agreement has been arranged between us for the payment of a sum of money, 10,000*l.*, which sum of money has been paid, and whereas it was further stipulated that such and such a thing should be done before the contract should come into effect, which thing has already been done," and there remains nothing but the mere formal execution of a deed of conveyance for the purpose of entirely and finally completing the matter, I can understand then it might be fairly said that under the agreement, coupled with the fulfilment of all the conditions precedent, and on the payment of the purchase-money, an equitable interest might be transferred to the vendee. But that is not the case in the present instance. The case here is simply, that this is an agreement entered into, which it is quite true is to have relation back so far as regards the receipt of the

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purchase-money, although the 8th clause stipulates that the purchase shall be completed upon July 1, and the company shall be entitled to possession of the business and property as from January 1 last. Then there are other assurances to be made if either party requires it.

That being so, the question really resolves itself into this, does this agreement transfer equitably or legally any property to, or vest any property actually in, the purchasers, so that they could at any time after the execution of the instrument, even although the deed of completion is postponed according to the language of the agreement itself, insist upon having a legal transfer made, treating the matter as having been already vested in them? Now there are one or two sections (apart from the authority which I am going to cite) to which our attention was called, which seem to me to have a considerable bearing on the matter. The first is s. 74, sub-s. 4, "Where a person having contracted for the purchase of any property," which is this case, "but not having obtained a conveyance," which is this case, "contracts to sell the whole or any part or parts thereof to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with ad valorem duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration." I should hardly have expected to find this clause in an Act relating to stamp duty, if upon the original contract for sale it was necessary that the ad valorem duty should be actually paid. Then we come to s. 76: "Where there are several instruments of conveyance for completing the purchaser's title to the property sold, the principal instrument of conveyance only is to be charged with ad valorem duty, and the other instruments are to be respectively charged with such other duty as they may be liable to." Then there is s. 96 with regard to leases, "An agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects for any term not exceeding thirty-five years is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement." When I find an

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exception, making an agreement for a lease chargeable with the ad valorem duty which would be payable upon a lease for the term which is mentioned in the agreement, and when I find it pointedly stated that an agreement for a lease shall be charged and chargeable in the same way that a lease actually for the same term would be chargeable, I cannot but think that, if the legislature had intended that a mere agreement for sale should be chargeable with the ad valorem duty, it would have expressed itself as clearly as it has done with reference to an agreement for a lease. There is, however, no such direction to be found in this statute, and we are driven, therefore, to consider what is the meaning of the terms which are used by the legislature in s. 70.

I have already stated that, in our judgment, the agreement does not operate as a transfer, either legally or equitably, of the property comprised therein, although no doubt it would confer upon the purchaser a right legally and equitably to have such a conveyance made, in the event of all the conditions precedent being fulfilled on the day, or before the day, on which the conveyance was to be finally settled. *Rayner* v. *Preston* (1) was cited to us as an authority for the proposition that the property had actually passed. I think that, when you are dealing with the stamp law requiring that the instrument shall at the time at which it is executed be stamped, and merely a privilege is conferred upon the parties who have omitted to stamp it, which justifies them in stamping it after the contract is executed, unless it can be said that, at the moment when the deed was executed, the Commissioners of Inland Revenue were entitled to call upon the parties, one or other of them, to have the deed stamped with an ad valorem stamp, if that could not be done at the time of the execution, I think that in that case the duty imposed is not the ad valorem duty, but merely the ordinary duty which would attach to an instrument bearing the denomination which the instrument purports to bear, and that the ad valorem duty can only be made chargeable where everything is completed at the time when the instrument is executed, and where no future day, as here, is appointed for the completion of it. I think, therefore, and I believe my Lord concurs in this view, that the

(1) 18 Ch. D. 1.

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ad valorem duty is not payable in this case, and that the only duty payable is the ordinary deed stamp of ten shillings.

The same judgment will, of course, be given in the other case; there is no distinction between the two.

LORD COLERIDGE, C.J. I am of the same opinion for the same reasons.

W. J. B.

The Commissioners appealed to the Court of Appeal.

1889. July 25, 26. *Sir E. Clarke, S.G.*, and *Dicey*, for the Commissioners. By the agreement of May 10, 1888, the goodwill of the business was, if not "legally," certainly "equitably," "transferred to or vested in" the new company. The corresponding provision of 55 Geo. 3, c. 184, sched. tit. "Conveyance," contained no reference to an "equitable" transfer of property or rights therein. The object of s. 70 (1) of the Act of 1870 was to cure this defect, and to provide that any instrument by virtue of which any right, legal or equitable, in property is upon a sale transferred to or vested in the purchaser—whether the instrument will be held by a Court of Law or by a Court of Equity to have that operation—shall be liable to the ad valorem duty prescribed. Sect. 76 throws light on the meaning of s. 70. The "goodwill" of a business is "property:" *Potter* v. *Commissioners of Inland Revenue.* (2) "Goodwill" may be either attached to a particular locality, or it may be a merely personal goodwill, attached to the name of the person who is carrying

(1) The schedule to the Act of 1870 imposes on a "conveyance or transfer on sale of any property" (except stock or debenture stock or funded debt previously mentioned) an ad valorem duty.

By s. 70, "The term 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf or by his direction."

By s. 76, "Where there are several instruments of conveyance for completing the purchaser's title to the property sold, the principal instrument of conveyance only is to be charged with ad valorem duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but such last-mentioned duty shall not exceed the ad valorem duty payable in respect of the principal instrument."

(2) 10 Ex. 147.

on a particular profession or business: *Pearson* v. *Pearson* (1); *Churton* v. *Douglas.* (2) No doubt "goodwill" may be transferred without a deed or writing: the Statute of Frauds does not apply to such a transfer. But in the present case the goodwill is transferred by the instrument, which is, therefore, liable to the ad valorem duty.

[LORD ESHER, M.R. The words of the agreement point to something which is to be done in the future.]

In *Horsfall* v. *Hey* (3) it was held that a document which purported to be a memorandum or record of a sale of goods and fixtures already made was liable to ad valorem duty as a "conveyance" of the property. Goods may be sold by parol, but, if they are sold by a written instrument, the stamp duty attaches.

A Court of Equity would compel the specific performance of this agreement for the transfer of the goodwill; it would compel the selling company to put the purchasing company in possession of the goodwill. In other words, the agreement is an equitable transfer of the goodwill. In *Churton* v. *Douglas* (2) an agreement to sell the goodwill of a business was regarded by Wood, V.C., as equivalent in equity to an assignment of the goodwill to the purchaser.

[LORD HALSBURY, L.C. If one company is extinguished, and another company is substituted for it, it is difficult to see how any goodwill can be transferred.]

The two companies are distinct entities or persons. In *Furness Ry. Co.* v. *Commissioners of Inland Revenue* (4) it was held that ad valorem duty was payable upon the transfer of the whole undertaking of one company to another, the capital of the transferring company being extinguished. The consideration for the transfer was an allotment of preference stock of the transferee company to the shareholders of the transferor company, and it was held that ad valorem duty was payable on the selling price of the stock at the date of the deed of transfer. The fact that the one company comes to an end does not prevent there being a transfer to its successor. It resembles the transfer which takes place on the death of an individual to his heir.

(1) 27 Ch. D. 145.
(2) Joh. 174.
(3) 2 Ex. 778.
(4) 33 L. J. (Ex.) 173.

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As to the meaning of the expression "equitably transferred," in equity a person who has entered into a contract to sell land is considered as having ceased to be the owner of it, and the purchaser is considered as having become the owner: Dart's Vendors and Purchasers, 6th ed. vol. i. p. 284.

[LORD HALSBURY, L.C. In that case the property itself is not transferred by the agreement.]

Any agreement which would be held by a Court of Equity to have such an effect is an "equitable transfer" of property within the meaning of s. 70.

[LORD HALSBURY, L.C.:—In order that s. 70 may apply, the property must be actually transferred by the instrument itself, not merely by virtue of an equitable doctrine. In *Commissioners of Inland Revenue* v. *Glasgow & South Western Railway Co.* (1) it was held that, upon the sale of business premises to a railway company, a sum given by the jury as compensation for loss of business was part of the consideration for the sale of the premises, and was therefore liable to ad valorem duty.]

In the present case the value of the goodwill is not separately stated in the agreement; in the next case of Lewis & Sons it is, but this cannot really make any difference.

At any rate since the Judicature Acts an agreement to grant a lease operates as an actual demise: *In re Maughan* (2); *Walsh* v. *Lonsdale.* (3) *Rayner* v. *Preston* (4) shews that the equitable interest in the goodwill passed to the purchasing company on the execution of the deed. The argument for the appellants amounts in short to this:—That an agreement for the sale and purchase of any property, real or personal, of which a Court of Equity would decree specific performance is, by virtue of s. 70 of the Act, a "conveyance on sale," and therefore liable to ad valorem duty.

It is admitted that, if the Court decides against this construction of s. 70, the decision will govern also the case of Lewis & Sons.

Warrington, for Angus & Co.; and *Phipson Beale, Q.C.*, and *Joseph Walton*, for Lewis & Sons, were not called upon.

(1) 12 App. Cas. 315.
(2) 14 Q. B. D. 956.
(3) 21 Ch. D. 9.
(4) 18 Ch. D. 1.

July 29. LORD ESHER, M.R. In this case the Commissioners of Inland Revenue decided that an ad valorem stamp ought to be attached to the instrument in question. The Divisional Court overruled their decision, and this appeal is brought by the Commissioners.

Now, the first thing to be observed is, that when the legislature assume to impose a tax on the subject, they must do so in clear and distinct terms; if the matter remains in doubt, the subject is entitled to judgment. Subject to that observation, the question is, whether the instrument which was laid before the Commissioners was a "conveyance on sale" within the meaning of s. 70 of the Stamp Act, 1870. That section says that "the term 'conveyance on sale'" (a "conveyance on sale" being one of the matters on which duty is imposed in the schedule to the Act, "agreements" being another), "includes every instrument whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser." The first thing to be noticed is, that the thing which is made liable to the duty is an "instrument." If a contract of purchase and sale, or a conveyance by way of purchase and sale, can be, or is, carried out without an instrument, the case is not within the section, and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at. And if anyone can carry through a purchase and sale without an instrument, then the legislature have not reached that transaction. The next thing is that it is not every instrument which may be brought into being in the course of a transaction of purchase and sale which is struck at. It is the instrument "whereby any property upon the sale thereof is legally or equitably transferred." The taxation is confined to the instrument whereby the property is transferred. The transfer must be made by the instrument. If a transfer requires something more than an instrument to carry it through, then the transaction is not struck at, and the instrument is not struck at because the property is not transferred by it.

The next thing to be noticed is the expression, "legally or equitably" transferred. When you are contrasting "legally"

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and "equitably," "legal" must be understood to refer to common law as distingished from equity. Therefore, "legally" transferred means transferred at common law, and "equitably transferred" means transferred according to equity. Can there be a common law transfer of an equitable interest? It seems to me that there cannot. Common law knows nothing about equity, and does not deal with equitable interests. There cannot, therefore, be a common law conveyance of an equity or of an equitable interest. If s. 70 had contained only the words "is legally transferred," it might well have been argued that an equitable transfer, which is a real transfer by instrument, was omitted, because it is not an instrument whereby property "is legally transferred." For this reason the words "or equitably" have been added, and I take the real meaning of the section to be this—When the property to be conveyed is a property known to the common law, then the conveyance, if there be one, will be a legal conveyance; and when the property to be conveyed is an equitable property or interest, then the conveyance, if there be one, will be an equitable conveyance. It does not mean an equitable conveyance of a common law property, or a legal conveyance of an equitable property, but the two kinds of conveyances are distributed each to that kind of property which it has to convey. I think that this view of the section will get rid of a great part of the difficulty.

Now the property which was to be conveyed in the present case is a legal property. I have no doubt that the goodwill of a business is "property" within the meaning of the section. It is always treated as property between a purchaser and a seller, and it is a legal property. Then the question is, whether the instrument which we have now to consider is an instrument "whereby" (that is, by the instrument itself alone) the property in the goodwill is conveyed. The instrument does not relate to the purchase and sale of the goodwill alone; it deals with the purchase and sale of certain premises, and of the goodwill of the business which has been carried on there. But, for the purpose of founding the argument which has been presented to us, the goodwill has been separated from all the other matters, and the instrument has been treated as if it related merely to the

purchase and sale of the goodwill, and not to the purchase and sale of the premises to which the goodwill has been attached. I think it has hardly been argued that this instrument is in terms a "conveyance." Everything stated in it is by way of agreement that so and so shall be done in the future. But it has been argued that it is an agreement of which a Court of Equity, in the event of the vendors not immediately fulfilling their agreement, would at once grant specific performance. And it is said that, when an agreement is such that equity will grant specific performance of it, it is to be considered as a conveyance in equity, or an "equitable conveyance." If that were true, it would be an equitable conveyance of a legal property or a legal right. But let us consider what the doctrine of specific performance is. If the instrument is a "conveyance" in itself, why do you want a decree for specific performance? If the instrument has conveyed the property to the purchaser, he does not require specific performance of an agreement with reference to his own property which has been already conveyed to him. The fact that the instrument is one of which equity will decree specific performance, fixes it at once as an "agreement," and not as a "conveyance." It would be a contradiction of terms to say that that which requires a decree for specific performance is in itself a "conveyance" which has conveyed the property to the purchaser. If there has been a "conveyance" of the property, you do not require specific performance. If property sold is conveyed by an instrument to the purchaser, and after that conveyance the vendor keeps it, the purchaser's remedy would not be by way of specific performance, but, if the property be personal property, by an action of trover; or, if it be real property, by an action of ejectment. In my opinion, therefore, however clear it may be that an instrument is an agreement of which a Court of Equity would instantly decree specific performance, if it were not performed by the vendor, such an instrument is not a "conveyance on sale" within the meaning of the Act, but is only an "agreement." If, therefore, the instrument now in question be of such a nature as this (and this is the highest at which it can possibly be put), I think it is clearly not within s. 70.

But there is more to be said about this instrument. It is, as

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it seems to me, only an agreement that some property shall pass to the purchaser after something else has been done. It has been skilfully treated in argument as an agreement with regard to the goodwill only. But it is not so. It is an agreement that the old company shall sell, and the new company shall purchase "all the freehold lands, buildings, and hereditaments, and all the goods, chattels, moneys, &c., and things in action of the old company, and the undertaking, business, and goodwill thereof, with the full benefit of all contracts, &c., and all other the real and personal property of the old company whatsoever and wheresoever." Now, what was the real subject-matter of this contract? It was a tannery carried on upon certain premises. In a tannery there are tan-pits, sheds, and other appliances, and probably some machinery. The business of a tannery is carried on upon premises which are specially fitted for it at a large expense. The first thing which is agreed to be sold here is the building—the place—where the business is carried on; and then, secondly, the goodwill of the business—not of *a* business, but of *the* business which had been carried on at that place. It is true that, after the purchase has been completed, the purchaser may remove the business to other premises, but that has nothing to do with the property which is sold. That which is sold is, first, the premises, and, secondly, the goodwill of the business carried on there. When it is said that the "old company shall sell, and the new company shall purchase" the premises, is that a conveyance" of the premises? In an ordinary case, no doubt, the vendor would have to make out his title to the premises. But here there is a stipulation (and this is relied on) that "the new company shall accept without investigation such title as the old company has to all the real and personal property agreed to be hereby sold," so that you get rid of any investigation of title. But, if the thing sold was not the vendors' at all, they could not force it upon the purchasers. I do not mean if there was merely a flaw in the title; but suppose the vendors were not in possession of the property, and had neither title nor possession to give to the purchasers, they could not then force the purchasers to complete their purchase. This document anticipates and looks forward to a "conveyance" of the premises. It is to be a

"conveyance" without any investigation of title, but it will be a "conveyance" nevertheless. I think there cannot be the smallest doubt that, with regard to the premises and the freehold property, this is an agreement for a conveyance to be executed. It may be an agreement of which specific performance would be granted, but the decree for specific performance would direct the vendors to convey the property to the purchasers.

But it is said that the goodwill can be sold and conveyed to the purchasers without any "conveyance" being executed, and, if you treat the document as only an agreement with regard to the goodwill, there never will be any conveyance executed, and the property would have been transferred to the purchasers without the Crown getting any ad valorem duty upon the transfer. If a vendor can convey the property sold to the purchaser without the execution of any instrument, he can convey it without paying any stamp duty under s. 70. The subject may have the good fortune to escape the stamp duty, if he can get a conveyance of property sold to him without the execution of any instrument. But it is said that if the appeal be decided against the Commissioners purchasers will rest satisfied with an agreement of which specific performance would be decreed, and will not go on to execute a conveyance, and so the Crown will lose the stamp duty, and it is rather suggested that this would be cheating the Crown and committing a fraud. The Crown, however, must make out its right to the duty, and if there be a means of evading the stamp duty, so much the better for those who can evade it. It is no fraud upon the Crown, it is a thing which they are perfectly entitled to do. The Crown cannot have the stamp duty unless the parties to the sale choose to effectuate the transaction by an instrument which of itself conveys the property, and, if they choose to be satisfied with something less, the matter is not brought within s. 70. I come therefore to the conclusion first that, if this instrument is an agreement of which specific performance would be immediately granted, still it is only an agreement. Something more is required to convey the property. Secondly, I doubt very much whether immediate specific performance would be decreed of the agreement as regards the

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goodwill. The truth is that the goodwill of the business will pass to the purchasers not by this instrument, but as soon as the real estate to which the goodwill is attached has passed to them; the moment the real estate is conveyed to them the goodwill will pass to them. It will not pass to them by this agreement alone; it will pass by the conveyance of the real estate which is contemplated as something subsequent to this agreement. And, thirdly, I think that, if the purchasers choose to rest upon this agreement, and possession is given to them of the premises, of the business and of the goodwill, and they are not interfered with for the next twenty years, that can make no difference; it is only when they proceed to a "conveyance" properly so-called that this stamp duty attaches. In my opinion the judgment of the Divisional Court was right, and these appeals must be dismissed. The construction which I have put on s. 70 will, I think, give a distinct and clear meaning to the words which for some time puzzled me, "legally or equitably transferred;"—the word "legally" applies to a legal transfer of a legal right, and the word "equitably" applies to an equitable transfer of an equitable interest.

LINDLEY, L.J. I also think that the Commissioners were wrong in their decision. They are inviting us to destroy the distinction between an agreement to convey property and a conveyance of the property. The question is, whether this instrument is a "conveyance" or a contract to convey. It has been ingeniously urged by the counsel for the Commissioners that, whichever it should be called scientifically, it is a "conveyance" within s. 70. The answer is, that, if this be a conveyance within s. 70, then every agreement for a conveyance of any property is within s. 70, though the distinction between "agreements" and "conveyances" is recognised in the Act itself, and the duty on "agreements" is provided for by another section.

The Inland Revenue Commissioners are not now contending that a conveyance of real property has been insufficiently stamped by reason of an increased value which the goodwill of a business gives to such property. The controversy now before us is not similar to that which was before the House of Lords in *Commis-*

sioners of Inland Revenue v. *Glasgow and South Western Ry. Co.* (1) It will be time enough to deal with that question when it arises. The Commissioners are insisting that this instrument, which on the face of it is a mere agreement, ought to be stamped, at any rate so far as the goodwill is concerned, with the ad valorem stamp applicable to a "conveyance." But any conveyancer—any lawyer—would see in a moment that this is not a "conveyance" at all. It is an agreement, which is a totally different thing. Lord Cottenham pointed out long ago in *Tasker* v. *Small* (2) that although, if a person agrees to buy land and the agreement is one of which a Court of Equity will decree specific performance, the purchaser becomes thereby in equity the owner in a certain sense, and acquires rights and interests which he can devise or sell, and which will pass to his heir by inheritance, still it is an entire mistake to suppose that an agreement is equivalent to a conveyance. Lord Cottenham said in that very case that the rule by which a purchaser becomes in equity the owner of the property sold "applies only as between the parties to the contract and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it." Let me enlarge upon that a little. Suppose a man to have an estate which is mortgaged, and to sell that estate subject to the mortgage, is there no difference in conveyancing language between the agreement for the purchase and the ultimate conveyance of the equity of redemption to the purchaser? Of course there is. It is true that by the contract itself the purchaser acquires a right to redeem the mortgage, and, if he chooses to redeem it, he will obtain the legal estate discharged from the mortgage. Moreover, in the interval he has all those rights which a formal conveyance would give him, except the vendor's covenants for title, which are usually inserted in a conveyance but not in an agreement. But, notwithstanding this, can it be said that there is no difference between an agreement and a conveyance? Did anyone ever hear of an ad valorem stamp being placed upon an agreement to buy an equity of redemption, or of an ad valorem stamp being omitted from a conveyance of an equity of redemption? The

(1) 12 App. Cas. 315. (2) 3 M. & C. 63.

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two things are plainly distinguishable. Even a judgment for specific performance does not transfer the property to the purchaser. This is obvious enough if we consider the jurisdiction of the Court to decree the specific performance of an agreement for the purchase of land situate in a foreign country. Ever since *Penn* v. *Lord Baltimore* (1) the Court of Chancery has exercised that jurisdiction. But why? Because it did not affect or profess to affect by its decree the property itself; it acted only in personam and compelled the vendor to do whatever was necessary to be done, either in this country or abroad, to transfer the property to the purchaser. This really disposes of the present case.

It was argued for the Crown that at all events the goodwill passed by this instrument. But that is not so. The goodwill does not pass by the instrument any more than any other property passes by an agreement. The goodwill of this business, that of a tannery, is incident partly to the real estate, partly I suppose to the possession of the books and the names of the customers; and partly, indeed mainly, it is due to the fact that the vendors will not carry on business in competition with the purchasers. The goodwill of a business is worth nothing, or next to nothing, if the seller carries on business in competition with the buyer, but his omission to do so cannot be described as "property," and yet it is to that omission that nine-tenths of the value of the goodwill is attributable. What I am now saying is in no way inconsistent with *Potter* v. *Commissioners of Inland Revenue* (2), where it was held that, upon a conveyance of the goodwill of a business, the instrument should be stamped with an ad valorem stamp. That case only shews that, if people choose to convey real estate by one deed and "goodwill" by another, and to apportion the whole consideration between them, the Commissioners would get the proper stamp duty, partly upon the conveyance of the real estate and partly upon the conveyance of the goodwill. But that decision does not affect the distinction between a contract and a conveyance, nor shew that the Commissioners can insist upon every contract for the sale of property being stamped with an ad valorem stamp as if it were a conveyance, though it may be true that one of the parties to the

(1) 1 Ves. Sen. 444. (2) 10 Ex. 147.

contract acquires under it equitable rights which in a certain sense may be described as "property."

It appears to me impossible to reverse the decision now appealed from, unless we are prepared to destroy the distinction between an "agreement" and a "conveyance," a distinction which is perfectly well known to every lawyer. I, for one, do not intend to destroy it, or to throw any doubt upon it. It seems to me that this is an experiment which ought to fail, and that the instrument ought to be stamped an "agreement," and not as a "conveyance on sale." It does not follow from our decision that the goodwill can be transferred by an instrument without any stamp at all, nor that the stamp duty on the conveyance of the real estate can be reduced by excluding the goodwill. I say nothing on these points. All I say is that this is an "agreement" and not a "conveyance," and must be stamped accordingly.

LORD ESHER, M.R. The Lord Chancellor has authorized me to say that he agrees entirely with our decision, and for the same reasons.

Appeals dismissed.

Solicitor for Commissioners: *Solicitor to Inland Revenue.*

Solicitors for Angus & Co: *Crossman & Prichard, agents for Stanton & Atkinson, Newcastle-on-Tyne.*

Solicitors for Lewis & Sons: *Sharpe, Parkers & Co., agents for Tyrer, Kenion & Co., Liverpool.*

See now the Revenue Act, 1889, 52 & 53 Vict. c. 42, s. 15.

W. L. C.

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July 13.

[IN THE COURT OF APPEAL.]

THE MOGUL STEAMSHIP COMPANY, LIMITED *v.* McGREGOR, GOW, & CO.; AND OTHERS.

Conspiracy—Combination to keep up Rate of Freight—Engrossing particular Trade—Exclusion of Rival Traders from Combination.

The defendants, who were firms of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of 5 per cent. on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and in consequence of such exclusion sustained damage:—

Held (by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting), affirming the judgment of Lord Coleridge, C.J., that the association being formed by the defendants with the view of keeping the trade in their own hands, and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for conspiracy was maintainable.

APPEAL from the judgment of Lord Coleridge, C.J., in an action tried without a jury, reported 21 Q. B. D. 544.

The plaintiffs claimed damages for a conspiracy to prevent them from carrying on their trade between London and China, and an injunction against the continuance of the alleged wrongful acts.

The facts upon which the claim was founded were as follows:—

The plaintiffs were a shipping company incorporated for the purpose of acquiring shares in certain steamships—the *Sikh*, *Afghan*, *Pathan*, and *Ghazee*—and became the owners of a large number of shares in these ships, which were built for and employed in the China and Australian trades. The defendants were an associated body of shipowners trading (among other places) between China and London, who formed themselves into a conference or association for the purpose of keeping up the rate of freights in the tea trade between China and Europe, and securing that trade to themselves by allowing a rebate of 5 per cent. on all freights paid by shippers who shipped tea for Europe

in Conference vessels only. The defendants alleged (and, as it is found in the judgment of Lord Coleridge, C.J., truly alleged) that the large profits derived from the tea freights alone enabled them to keep up a regular line of communication all the year round between England and China, and that without a practical monopoly of the tea trade they must cease to do so. The plaintiffs were admitted to the benefits of this conference for the season of 1884, when the following circular was widely distributed by the defendants among the merchants engaged in the China trade:—

"Shanghai, 10th May, 1884.

"To those exporters who confine their shipments of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the *P. & O. Steam Navigation Co.'s, Messagerie Maritime Co.'s, Ocean Steamship Co.'s, Glen, Castle, Shire,* and *Ben Lines,* and to the steamships *Oopack* and *Ningchow,* we shall be happy to allow a rebate of 5 per cent. on the freight charged.

"Exporters claiming the returns will be required to sign a declaration that they have not made nor been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by any other than the said lines.

"Shipments by the steamships *Afghan, Pathan,* and *Ghazee* on their present voyages from Hankow will not prejudice claims for returns.

"Each line to be responsible for its own returns only, which will be payable half-yearly, commencing 30th October next.

"Shipments by an outside steamer at any of the ports in China or at Hong Kong will exclude the firm making such shipments from participation in the return during the whole six-monthly period within which they have been made, even although its other branches may have given entire support to the above lines.

"The foregoing agreement on our part to be in force from present date till the 30th April, 1886."

In May, 1885, the defendants issued and widely distributed among the merchants in the China trade the following circular,

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which had the effect of excluding the plaintiffs from the benefits of the conference:—

"Shanghai, 11 May, 1885.

"Referring to our circular dated 10th May, 1884, we beg to remind you that shipments for London by the steamships *Pathan*, *Afghan*, and *Aberdeen*, or by other non-Conference steamers, at any of the ports in China or at Hong Kong, will exclude the firm making such shipments from participation in the return during the whole six-monthly period in which they have been made, even although the firm elsewhere may have given exclusive support to the Conference lines."

The plaintiffs by their statement of claim alleged a conspiracy on the part of the defendants to prevent the plaintiffs from obtaining cargoes for their steamers, such conspiracy consisting in a combination and agreement amongst the defendants, having by reason of such combination and agreement control of the homeward shipping trade, pursuant to which combination and agreement shippers were bribed, coerced, and induced to agree to forbear, and to forbear, from shipping cargoes by the plaintiffs' steamers. In the alternative, the conspiracy was alleged to consist of a combination and agreement amongst the defendants, pursuant to which the defendants, with intent to injure the plaintiffs and prevent them obtaining cargoes for their steamers, agreed to refuse, and refused, to accept cargoes from shippers except upon the terms that the shippers should not ship any cargoes by the plaintiffs' steamers, and by threats of stopping the shipment of homeward cargoes altogether, which they had the power and intended to carry into effect, prevented shippers from shipping cargoes by the plaintiffs' steamers. It is unnecessary for the purposes of this report to set out the defence except to say that the defendants denied the alleged conspiracy and combination, and further contended that the statement of claim disclosed no cause of action.

Lord Coleridge, C.J., gave judgment for the defendants (21 Q. B. D. 544).

The plaintiffs appealed.

1888. Mar. 5. *Sir H. James, Q.C., Crump, Q.C., Barnes, Q.C.,* and *Sims Williams,* for the plaintiffs.

Sir Charles Russell, Q.C., Sir Horace Davey, Q.C., Finlay, Q.C., and *Pollard,* for the defendants.

Cur. adv. vult.

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1889. July 13. The following judgments were now read:—

LORD ESHER, M.R. In this case the evidence is voluminous and complicated. On carefully dissecting it, it seems to prove the following facts:—At some time before an agreement, which will hereafter be referred to, was entered into between the defendants, it appeared to the defendants that if more than a certain number of ships loaded tea at Hankow or Shanghai for England, the freights before charged could not be maintained. This is shewn by "suggestions to be considered as strictly confidential between the managers of the Peninsular and Oriental, the Glen, and the Ocean Steamship Companies." It begins: "So long as there is a glut of tonnage at Hankow, whether 'Conference' or not, it is impossible to maintain freights." The defendants, therefore, resolved upon a plan, by which the number of vessels loading at those places should be limited. The plan was that a certain number of shipowners' firms—namely, the defendant firms—should enter into an agreement with each other that each of them should send an agreed number of ships to Hankow in the season, and that they should not admit more than a certain number of firms to be parties to the agreement, and that they should do certain things then agreed upon, and certain other things which should be afterwards agreed upon if thought necessary, in order to prevent any of those whom they did not admit to be parties to the agreement from being able to load tea at Hankow with any profit. Thus they would after a time drive any of such parties out of the carrying trade from Hankow or Shanghai to England, and then they, the confederated firms, could maintain the high freights which a free competition would inevitably lower. The means of prevention first agreed upon were an agreement that any shipping agent or shipping principal who agreed to ship, and who shipped only on Conference

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steamers throughout a season, should receive a rebate of 5 per cent. on the agreed rate of freight of each shipment; but if any such agent, though directed by his principal to do so, or if any principal should ship any one cargo in a named period on board a non-Conference steamer, he should not receive any rebate in respect of any cargo he had, either before the shipment on a non-Conference ship or after it, during the period, shipped on board a Conference ship. The means afterwards agreed upon and added were that if any non-Conference steamer should proceed to Hankow to load independently, any necessary number of Conference steamers should be sent at the same time to Hankow, in order to underbid the freight which the independent steamer might offer, without any regard to whether the freight they should thus bid would be remunerative or not. The plan was reduced into a written agreement signed by the defendants, dated originally April 7, 1884, and renewed or enlarged by verbal agreement, before May, 1885. This agreement stipulated that it was to bind each defendant until he should give a particular notice—namely, to all the principals at home. The agreement having been entered into by the defendants, they in May, 1885, refused to admit the plaintiffs to be parties to it. The plaintiffs thereupon resolved to send, and did send, two of their steamers, the *Pathan* and the *Afghan*, to Hankow, in order to obtain freights independently. The defendants issued circulars on May 11, 1885:—"That shipments by the steamships *Pathan*, *Afghan*, and *Aberdeen*, or by other non-Conference steamers at any of the ports in China, or at Hongkong, will exclude the firm making such shipments from participation in the return during the whole six-monthly period in which they have been made, even although the firm elsewhere may have given exclusive support to the Conference lines." Besides this, the defendants agreed to send, and did send, as many vessels as their agents thought necessary for the purpose to Hankow, for the express purpose of obtaining the carriage of all tea at any freight, however small, which might underbid and so oust the *Pathan*, the *Afghan*, or any other vessel of the plaintiffs from the carrying trade. The ultimate object of the defendants was no doubt to benefit themselves; but the immediate purpose was to drive out

the plaintiffs. (See letters of May 1, 1885 (1); May 8, 1885 (2); and May 8, 1885. (3)) By the means agreed upon by the action directed by the defendants, the freight from Hankow to England was lowered from 50*s.* and upwards to 25*s.*, which was a wholly unremunerative freight, which could not be called an ordinary business freight, which was an artificial freight produced by the action of the defendants in order to carry out their immediate purpose of driving out the plaintiffs. The plaintiffs carried at the 25*s.* freight on that occasion, rather than sail their ships, which were already there, home empty. But it is obvious that if the contest were to be continued, the plaintiffs could not send their ships again to Hankow; they must be effectively driven out of the Hankow carrying trade, just as certainly and effectively as if their ships were physically stopped from going there. The plaintiffs being by the acts of the defendants driven from the trade, the defendants would resume their old rates of freight, rates fixed without competition. The plaintiffs on the season of 1885 would have earned a higher freight than 25*s.* In respect of subsequent years they were prevented from attempting to earn, according to circumstances and their own judgment, any freight from Hankow to England. The question is whether what the defendants did, and its consequences to the plaintiffs, gave the latter any legal cause of action.

It seems to me well to consider first what view the law takes of the agreement of April 7, 1884, renewed or enlarged in 1885. In *Hilton* v. *Eckersley* (4), a bond was executed by certain masters, by which they agreed to be bound to each other in a penalty, nominally payable to one of them, if any one of them should

(1) From the chairman of the Peninsular and Oriental Steam Ship Company (defendants), threatening to close their relations with their agents at Hankow if they carried out their intention of loading home direct from Hankow for the plantiffs.

(2) From the representative of the Ocean Steam Ship Company (defendants), containing the following expression, "to successfully oppose these outsiders it is necessary to have considerably more Conference tonnage at Hankow."

(3) From agents at Shanghai to one of the defendant firms containing the following expression, "the best way to meet the case is to sanction a few more Conference vessels going to Hankow, as with this supply of tonnage they would stand but little chance of getting full cargoes."

(4) 6 E. & B. 47.

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carry on his works, in regard to amount of wages to be paid to persons employed therein, and as to the times or periods of the engagement of workpeople and the hours of work, otherwise than in conformity with the resolutions of the majority of the said masters. The defendant, one of the signing masters, carried on his works contrary to a resolution of the others, whereupon he was sued on the bond for the penalty. Crompton, J., said: "I am of opinion that the bond is void, as being against public policy. I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture." "One of the most objectionable parts of this bond is that it takes away the freedom of action of the individual to carry on the trade, and to open and close his works according as it may be for his interest or that of the public." He held that the bond was void as between the parties to it, because it was illegal as being in restraint of trade. Lord Campbell doubted whether the bond was illegal to the extent of rendering the parties to it indictable, but agreed that it was illegal as between the parties, and was, therefore, void. In the Court of Exchequer Chamber Alderson, B., gave the judgment. "The question," he said, "is whether this is a bond in restraint of trade: and we think it is so. Primâ facie, it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion and choice." Speaking of the regulations, he said: "All these are surely regulations restraining each man's power of carrying on his trade according to his discretion for his own best advantage, and therefore are restraints on trade, not capable of being legally enforced." "We do not mean to say that they are illegal, in the sense of being punishable and criminal. The case does not require us, and we think we ought not to express any opinion on that point." He then goes on to say that the fact of the combination of masters being formed to counteract a combination of workmen cannot render the masters' combination legal. "The maxim 'injuria non excusat injuriam,' is a sound one, both in common sense and at common law." *Hornby* v. *Close* (1) is to the same effect. These cases decide that there is

(1) Law Rep. 2 Q. B. 153.

still, according to law, a restraint of trade which is contrary to law. They decide that an agreement whereby traders bind themselves not to carry on their trade according to their own judgment, but according to the judgment of others, is an agreement in restraint of trade. They decide that if such an agreement is made out, it is not made legal because it is entered into as a counter-move against another similar agreement. Applying these propositions to the agreement of 1885, the defendants by it agree to carry on their trade of shipowners, not each according to his own judgment as circumstances may arise, but according to an agreed rule arrived at by the consent of others, not to be departed from without the consent of all. Unless the law holds this agreement to be void, the defendants have bound themselves to it by mutual agreement, which would be a sufficient consideration to bind each of them. They have bound themselves not to depart from the agreement without a particular kind of notice. The agreement, in accordance with the cited cases, must be held to be in restraint of trade, and therefore void as between the parties to it. The only reason why it can be held void is because it is illegal. A legal agreement voluntarily come to cannot be held by law to be void. The cited cases leave open the question whether such an agreement amounts to an indictable conspiracy. They do not hold that it is not. But before considering that point it must be observed that the agreements held to be illegal because in restraint of trade must have been so held, not because there was any wrong done to the traders who agreed—for they all agreed to what was to be done—but because there was a wrong to the public. The restraining themselves from a free course of trade was held to be a wrong to the public. If that be so when parties agree to restrain themselves, it must be much more so when they agree to do acts which will restrain and are intended to restrain another trader from a free course of trade. That restraint is equally a wrong to the public. The present agreement is therefore illegal and void as in restraint of trade on that ground also.

The cases cited do not determine whether an agreement which is void as between the parties to it because it is in restraint of trade is or is not an indictable offence. But if such an agree-

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ment is illegal because it is a wrong to the public, it seems to me impossible to say that it is not indictable. An illegal act which is a wrong against the public welfare seems to have the necessary elements of a crime. If, however, all agreements in restraint of trade are not necessarily indictable offences, yet some may be. And if the agreement is one intended to interfere with the free course of trade of a trader who is not a party to the agreement, and can, if carried out, have that effect, then if such an interference is an illegal act as against the trader, it seems clear that the act of agreement is a wrongful act, both as against an individual and as against the public welfare, and then I am of opinion it must be an indictable conspiracy. "There seems," says Sir William Erle, in the most admirable essay styled The Law relating to Trade Unions (1), a book more full of careful and accurate law than is to be found in many judgments, "also to be authority for saying that a combination to violate a private right, in which the public has a sufficient interest, is a crime, such a violation being an actionable wrong:" Erle, p. 32. Unless the public has an interest in traders being left to their own judgment, and to a free course of trade, there is no foundation for the law as to agreements in restraint of trade being illegal. The public, therefore, has an interest which such agreement injures. It follows that if the agreement be an agreement to violate the right of an independent trader by restraining his trade, there is a sufficient public interest which is also injured, and the agreement is an indictable conspiracy. It becomes necessary now to consider what interference with an independent trader will be a violation of his private right. Now, a long line of cases has determined that every trader in the Queen's dominions has by law a legal right to carry on his trade in ordinary course of trade according to his own will and judgment, and the law has decided that for some kinds of interference with that right the trader interfered with has a right of action. Alderson, B., in the Exchequer Chamber, in *Hilton* v. *Eckersley* (2), says, "Primâ facie, it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion and choice." Turning

(1) Macmillan & Co. 1869. (2) 6 E. & B. 47, at p. 74.

again to the careful analysis of law in Sir William Erle's book, I agree with him (page 13) that "these propositions assume that a person has a right to do as he chooses with his own, whether labour or capital, within the limits set by law; that a right involves a prohibition against the infringement thereof; and that a prohibition involves a remedy for the violation thereof." The particular right of a trader—which we are considering—is his right to carry on his trade according to a free course of trade. The plaintiffs had that right on their side; but so also had the defendants on their side. The next question is, What will amount, as between rival traders, to an encroachment by the one on this right of the other? Each has a right to carry on his trade in a free course of trade, according to his own free will and judgment. So long as the one so carries on his trade, the other cannot, without infringing on the right of his rival, effectively complain. So long as each so carries on his trade, though such carrying on produces the utmost extent of competition, and consequent lowering of gain, neither can validly complain. Each is exercising the free course of trade. But if one goes beyond the exercise of the course of trade, and does an act beyond what is the course of trade, in order—that is to say, with intent—to molest the other's free course of trade, and which does molest the other's free course of trade, he is not exercising his own freedom of a course of trade; he is not acting in, but beyond, the course of trade; and then it follows that his act is an unlawful obstruction of the other's right to a free course of trade; and if such obstruction causes damage to the other, he is entitled to maintain an action for the wrong. "At common law," says Sir W. Erle (page 6), "every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable obstruction." "Every person has a right under the law, as between him and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the

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exercise of the right comprised within this description—done, not in the exercise of the actor's own right, but for the purpose of obstruction—would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be remedied either by action or indictment, as the case may be. It is equally a wrong whether it be done by one or by many—subject to this observation, that a combination of many to do a wrong, in a matter where the public has an interest, is a substantive offence of conspiracy" (p. 12). The limitation of the competing rights, then, is, that the act which has in fact obstructed the full right of the one, must, in order to be actionable, be an act done by the other beyond the exercise of the actor's own right, and for the purpose of obstruction. In *Lumley* v. *Gye* (1), and in *Bowen* v. *Hall* (2), the act done which obstructed the plaintiff's right was the persuading a person employed by the plaintiff, under contract, to break that contract. Such persuasion is not in ordinary course of trade. The ordinary competition of trade is a fair competition, not a secret persuasion of others to do wrong. The next question in those cases was, whether what was done was intended to obstruct the plaintiff. With regard to that point, it is laid down in *Bowen* v. *Hall* (3): "The act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract may not be wrongful in law or fact . . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." The law there is laid down that a malicious motive in the defendant may make an act which would not be wrongful without the malice, a wrongful act when done with malice. It was thought that the judgment in *Lumley* v. *Gye* (1) was founded on the view that there was malice in the defendant, and that view was adopted and approved in *Bowen* v. *Hall* (2). The word "malice" is satisfied by the thing being

(1) 2 E. & B. 216. (2) 6 Q. B. D. 333.
(3) 6 Q. B. D. 333, at p. 338.

done with the knowledge of the plaintiff's right and with intent to interfere with it "maliciously," or, which is the same thing, "with notice," per Crompton, J., in *Lumley* v. *Gye*. (1) This effect of malice is adopted by Sir W. Erle, and so long ago as by Lord Holt in *Keeble* v. *Hickeringill*. (2) "Suppose," he says, "the defendant had shot in his own ground; if he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing, and a wrong." In truth I have never known this rule doubted.

The propositions applicable to the present case which are to be deduced from the above considerations are the following: First, that the head of law, which we are considering, applies only to trade and to traders; second, that the law has a peculiar care for the preservation of a free course of trade as between traders, because such freedom is for the benefit of the public; third, that the principal formula of law for the purpose of enforcing this peculiar care is—that every trader has a legal right to a free course of trade, meaning thereby a legal right to be left free to exercise his trade according to his own will and judgment; fourth, that if anyone, by an act wrongful as against that right, interferes with it to the injury of a trader, an action lies against such person by such trader; fifth, that any act of fair trade competition, though it injure a rival trader even to the destruction of his trade, is not a wrongful act as against such rival trader's right, but is only the exercise of the first-mentioned trader's equal right, and is therefore not actionable; sixth, any act, though of the nature of competition in trade, but which is an act beyond the limits of fair trade competition, and which is therefore not an act of any real course of trade at all, and the immediate and necessary effect of which is such an interference with a rival trader's right to a free course of trade as prevents him from exercising his full right to a free course of trade, leads to an almost irresistible inference of an indirect motive, and is therefore—unless, as may be possible, the motive is negatived—a wrongful act as against his right, and is actionable if injury ensue; seventh, an act of competition, otherwise unobjectionable, done not for the purpose of competition, but with intent to injure

(1) 2 E. & B. 216, at p. 224. (2) 11 East, note, p. 574.

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a rival trader in his trade, is not an act done in an ordinary course of trade, and therefore is actionable if injury ensue; eighth, an agreement among two or more traders, who are not and do not intend to be partners, but where each is to carry on his trade according to his own will, except as regards the agreed act, that agreed act being one to be done for the purpose of interfering, i.e. with intent to interfere with the trade of another, is a thing done not in the due course of trade, and is therefore an act wrongful against that other trader, and is also wrongful against the right of the public to have free competition among traders, and is therefore a wrongful act against such trader, and, if it is carried out and injury ensue, is actionable; ninth, such an agreement, being a public wrong, is also of itself an illegal conspiracy, and is indictable.

It follows that in the present case the agreement of 1885 was within the rules (8) and (9) an indictable conspiracy, and that when it was carried out to its immediate and intended effect, which was an injury to the plaintiffs' right to a free course of trade, the plaintiffs had a good cause of action against the defendants.

It follows that the act of the defendants in lowering their freights far beyond a lowering for any purpose of trade—that is to say, so low that if they continued it they themselves could not carry on trade—was not an act done in the exercise of their own free right of trade, but was an act done evidently for the purpose of interfering with, i.e. with intent to interfere with, the plaintiffs' right to a free course of trade, and was therefore a wrongful act as against the plaintiffs' right; and as injury ensued to the plaintiffs, they had also in respect of such act a right of action against the defendants. The plaintiffs, in respect of that act, would have had a right of action if it had been done by one defendant only; they have it still more clearly when that act was done by several defendants combined for that purpose. For these reasons I come to the conclusion that the plaintiffs were entitled to judgment. The damages, if that be the correct conclusion as to the right of action, are to be ascertained. They are, in my opinion, the difference between the freight of 25s., which the plaintiffs were forced to accept, and the freight they

would have obtained without other interference than a legal fair competition in 1885, and damages at large for being prevented from endeavouring to earn freight from Hankow to England in subsequent years, after taking into account the probability of using their ships in some other trade. I am of opinion that the appeal should be allowed.

BOWEN, L.J. We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purposes of the present case, we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law. The defendants are a number of shipowners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object, and to discourage the plaintiffs' vessels from resorting to those ports, the defendants during the "tea harvest" of 1885 combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus rendering it unprofitable for the plaintiffs to send their ships thither. They offered, moreover, a rebate of 5 per cent. to all local shippers and agents who would deal exclusively with vessels belonging to the Conference, and any agent who broke the condition was to forfeit the entire rebate on all shipments made on behalf of any and every one of his principals during the whole year—a forfeiture of rebate or allowance which was denominated as "penal" by the plaintiffs' counsel. It must, however, be taken as established that the rebate was one which the defendants need never have allowed at all to their customers. It must also be taken that the defendants

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had no personal ill-will to the plaintiffs, nor any desire to harm them except such as is involved in the wish and intention to discourage by such measures the plaintiffs from sending rival vessels to such ports. The acts of which the plaintiffs particularly complained were as follows:—First, a circular of May 10, 1885, by which the defendants offered to the local shippers and their agents a benefit by way of rebate if they would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled. Secondly, the sending of special ships to Hankow in order by competition to deprive the plaintiffs' vessels of profitable freight. Thirdly, the offer at Hankow of freights at a level which would not repay a shipowner for his adventure, in order to "smash" freights and frighten the plaintiffs from the field. Fourthly, pressure put on the defendants' own agents to induce them to ship only by the defendants' vessels, and not by those of the plaintiffs. It is to be observed with regard to all these acts of which complaint is made that they were acts that in themselves could not be said to be illegal unless made so by the object with which, or the combination in the course of which, they were done; and that in reality what is complained of is the pursuing of trade competition to a length which the plaintiffs consider oppressive and prejudicial to themselves. We were invited by the plaintiffs' counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms "maliciously," "wrongfully," and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to "injure" in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. "Maliciously," in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term "wrongful" imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel still, therefore, leaves unsolved the question of

what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness, I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.

The English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the animus vicino nocendi, may enter into or affect the conception of a personal wrong; see *Chasemore* v. *Richards*. (1) All personal wrong means the infringement of some personal right. "It is essential to an action in tort," say the Privy Council in *Rogers* v. *Rajendro Dutt* (2), "that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests, is not enough." What, then, were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong (see *Bromage* v. *Prosser* (3); *Capital and Counties Bank* v. *Henty*, per Lord Blackburn. (4)) The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

(1) 7 H. L. C. 349, at p. 338.
(2) 13 Moore, P. C. 209.
(3) 4 B. & C. 247.
(4) 7 App. Cas. 741, at p. 772.

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What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognises and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by shew of violence: *Tarleton* v. *M'Gawley* (1); the obstruction of actors on the stage by preconcerted hissing: *Clifford* v. *Brandon* (2); *Gregory* v. *Brunswick* (3); the disturbance of wild fowl in decoys by the firing of guns: *Carrington* v. *Taylor* (4), and *Keeble* v. *Hickeringill* (5); the impeding or threatening servants or workmen: *Garret* v. *Taylor* (6); the inducing persons under personal contracts to break their contracts: *Bowen* v. *Hall* (7); *Lumley* v. *Gye* (8); all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause

(1) Peak, N. P. C. 270.
(2) 2 Camp. 358.
(3) 6 Man. & G. 205.
(4) 11 East, 571.
(5) 11 East, 574, n.
(6) Cro Jac. 567.
(7) 6 Q. B. D. 333.
(8) 2 E. & B. 216.

or excuse" acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right in rem or in personam, there is some natural standard of "fairness" or "reasonableness" (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates provided they did not lower them beyond a "fair freight," whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a "fair freight"? It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary "normal" standard of freights or prices, or that Law Courts had a right to say to them in respect of their competitive tariffs, "Thus far shalt thou go and no further." To attempt to limit English competition in this way would probably be as hopeless

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an endeavour as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can in my opinion be warranted. A man is bound not to use his property so as to infringe upon another's right. Sic utere tuo ut alienum non laedas. If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable: see *Chasemore* v. *Richards.* (1) If there is no such fetter upon the use of property known to the English law, why should there be any such a fetter upon trade?

It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy: see *Skinner* v. *Gunton* (2); *Hutchins* v. *Hutchins.* (3) But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means: *O'Connell* v. *The Queen* (4); *Reg.* v. *Parnell* (5); and the question to be solved

(1) 7 H. L. C. 349.
(2) 1 Wms. Saund. 229.
(3) 7 Hill's New York Cases, 104; Bigelow's Leading Cases on Torts, 207.
(4) 11 Cl & F. 155.
(5) 14 Cox, Criminal Cases, 508.

is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to shew that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only differentia that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only. The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company limited, is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a

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design to do that which is hurtful without just cause—is evidence —to use a technical expression—of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up by preconcerted action all the provisions in a market or district in times of scarcity: see *Rex* v. *Waddington* (1); to combine to purchase all the shares of a company against a coming settling-day; or to agree to give away articles of trade gratis in order to withdraw custom from a trader? May two itinerant match-vendors combine to sell matches below their value in order by competition to drive a third match-vendor from the street? In cases like these, where the elements of intimidation, molestation, or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, Was it done with or without "just cause or excuse"? If it was bonâ fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: see the summing-up of Erle, J., and the judgment of the Queen's Bench in *Reg.* v. *Rowlands.* (2) But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances

(1) 1 East, 143. (2) 17 Q. B. 671.

and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J., in *Reg.* v. *Rowlands* (1), of workmen and of masters: "The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Lastly, we are asked to hold the defendants' Conference or association illegal, as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognise their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in *Hilton* v. *Eckersley* (2), is, I think, not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. Lord Eldon's equity decision in *Cousins* v. *Smith* (3) is not very intelligible, even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his Lives of the Chancellors. If indeed it could be plainly proved that the mere formation of "conferences," "trusts," or "associations" such as these were always necessarily injurious to the public—a view which involves, perhaps, the disputable assumption that, in a country of free trade, and one which is not under the iron régime of statutory monopolies, such confederations can ever be really successful—and if the evil of them were not sufficiently dealt with by the common law rule, which held

(1) 17 Q. B. 671, at p. 687, n.
(2) 6 E. & B. 47.
(3) 13 Ves. 542.

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such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions are, to my mind, at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.

In the result, I agree with Lord Coleridge, C.J., and differ, with regret, from the Master of the Rolls. The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness," or of "normal" prices, or "fair freights," to which commercial adventurers, otherwise innocent, were bound to conform.

In my opinion, accordingly, this appeal ought to be dismissed with costs.

FRY, L.J. The plaintiffs and defendants in this case are owners of steamships, and the plaintiffs allege in substance that the defendants have unlawfully conspired together and done certain acts in pursuance of their conspiracy whereby the plaintiffs have sustained both damage and injury. Both plaintiffs and defendants were concerned in the trade with China, and their steamships visited, amongst other ports, Shanghai, at the mouth of the Yangtsze, and Hankow, which is 600 miles up that great river. The defendants' ships were more regularly employed in the China trade than those of the plaintiffs, which appear only to have visited Hankow at the height of the season for shipping tea—that is, in the months of May and June. In 1884 the

defendants had formed a combination substantially like the one which I shall presently mention in detail, but it was part of the arrangement of 1884 that the employment of certain ships of the plaintiffs should not entail on the shippers the loss of rebate. In 1885 the defendants again formed amongst themselves an arrangement which they call a Conference, and which the plaintiffs call a conspiracy. The terms of that arrangement are embodied in a written agreement dated April 7, 1885. This agreement regulated, as between the defendants themselves, the trade with China and Japan; it provided for a certain division of cargoes, and for the determination of the rates of freight. But with regard to Hankow, not only did these general stipulations apply to it, but certain special stipulations were come to, having clearly for their object the prevention of competition for freights at Hankow by any of the class of ships described as outsiders—that is, vessels not belonging to any member of the conference. This object was to be accomplished in three ways:—First, it was stipulated that, if outsiders should start for Hankow, they were to be met by Conference steamers and encountered with "effective opposition," the determination of what Conference ships should be employed for this purpose being left to the agents at Shanghai of the defendant firms. Secondly, it was stipulated that the agents of the Conference ships should be "prohibited"—and here again I use the words of the agreement—"from being interested, directly or indirectly, in outsiders;" i.e., they were to be removed from the agency of the defendants' ships if they took any part in the business of non-Conference steamers. Thirdly, the agreement provided for a rebate of 5 per cent. being made to firms which shipped exclusively by Conference ships—a benefit which was to be denied if a single shipment were made by an outsider, except in case of there not being a Conference steamer in port or named for despatch within a week with available cargo space, in which event shipments by an outsider would not work a loss of the rebate. The only other provision of the agreement to which it is necessary to refer is, that each of the parties to it was at liberty to withdraw from the agreement on notice.

Upon this document I pause to make certain observations. In the first place, I am of opinion that it discloses the real bargain

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between the defendants, and that its purport is not substantially altered by any evidence in this case. In the next place, I conclude that, at the date of the agreement, the plaintiffs were probably in the contemplation of the defendants as persons who might possibly send ships to compete, but that with that exception the plaintiffs were not objects in the minds of the defendants when they entered into the agreement, and that the defendants were actuated by no personal ill-feeling, or malice in fact, towards the plaintiffs. Thirdly, in my judgment, the real object of the agreement was the acquisition of gain by the defendants, and the means by which they sought to accomplish this end was a competition on the part of the united shipowners against all the world, so vigorous as to drive outsiders from the field, and thus to prevent competition in the future. This was the direct scope of the provisions as to meeting outsiders and as to rebate, and the stipulation as to agents I regard as incidental to it: for the members of the Conference might well desire that in such a conflict they should be represented by men entirely devoted to their plans and interests, and not by agents acting for shipowners engaged on both sides of the struggle. Fourthly, I am of opinion that competition was in substance the only weapon which the defendants intended to use against their rivals in trade. No thought of using violence, molestation, intimidation, fraud, or misrepresentation was entertained by the defendants. Briefly speaking, therefore, the scheme of the Conference was, by means of competition in the near future, to prevent competition in the remoter future.

On April 22 interviews took place between Mr. Gellatly, the managing director of the plaintiff company, and the defendants Swire, M'Gregor, Holt, and Sutherland, which have been insisted on as important by both sides in argument before us. Mr. Gellatly tried to persuade the defendants to allow him to have a place in their arrangements, and, failing this, threatened, to use his own language, to "smash rates" at Hankow. What then passed between the parties does not seem to me very material. Shortly after the agreement was entered into copies of it were transmitted by most or all of the defendant firms to their agents in Shanghai, in order that they might act upon it.

On May 1 it was known to the defendants' agents at Shanghai that the *Pathan*, one of the plaintiffs' steamships, was going up the river to Hankow, to look for a cargo of tea at the height of the season; and she was to be followed by the *Afghan*, another of the plaintiffs' fleet. On May 8 three of the Conference vessels were sent up the river to add to the Conference vessels already at Hankow, and to take part in competing against the outsiders for homeward freight; and three days afterwards a circular was issued by the Conference agents at Shanghai to shippers at Hankow, referring by name to the *Pathan* and *Afghan*, and warning shippers that the rebate would be lost by shipment by these or any outside ships. This circular was much insisted on by the plaintiffs' counsel as an act of hostility directed against the plaintiffs' vessels in particular, and as an act of malice towards the plaintiffs personally; and they further observed that it did not disclose to the shippers the provision of the agreement of April 7, by which in certain cases shipments might be made on board outsiders without loss of the right to rebate. In my opinion the circular was the natural result of the agreement of April 7, and does not carry the case of the plaintiffs further than as an overt act giving effect to that agreement. Considering that the *Pathan* and *Afghan* had in 1884 been allowed to receive cargo without its entailing a loss of the rebate on the shippers, I think that the reference to those ships by name was fair towards the shippers, and does not shew any personal malice against the plaintiffs.

On the 14th May the Conference agents met at Shanghai, and determined on a general reduction of freights at Hankow, as a means of depriving the *Pathan* and *Afghan* of the chance of a successful venture, and in the pious hope that they might go down the Yangtsze, as they had come up, in ballast. Instructions were accordingly sent to Hankow, freights were reduced, and the plaintiffs' ships obtained freights, but at rates so low as to leave little or no profit—rates which, on the evidence, I conclude were brought down by the action of the defendants, and were lower than would have been obtained if there had been open competition and no combination amongst the defendant firms.

On the 29th May, whilst the *Pathan* was full at Hankow and on the point of sailing, and whilst the *Afghan* was rapidly

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taking her cargo on board, this action was brought. The parties having agreed to leave the question of damages, if any, to reference or arbitration, I shall assume that the plaintiffs may shew that in point of fact they have sustained damage from the defendants' acts. The plaintiffs allege that the Conference was an unlawful conspiracy; that the agreement then entered into was carried into execution by the sending up of the three ships expressly to compete with the plaintiffs' vessels, by the circular and by the reduction of freights; that these acts were wrongful, and have caused damage to them, and consequently were actionable.

I cannot doubt that whenever persons enter into an agreement which constitutes at law an indictable conspiracy, and that agreement is carried into execution by the conspirators by means of an unlawful act or acts which produce private injury to some person, that person has a cause of action against the conspirators. Was the agreement in the present case an unlawful conspiracy?

"The crime of conspiracy," said Tindal, C.J.— speaking for the judges attending the House of Lords in *O'Connell's Case* (1)— "is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even lawful." "A conspiracy," said Willes, J., "consists in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." (2) In all cases, therefore, a conspiracy is an agreement to do an unlawful act. It is immaterial whether that act be (*a*) the principal object and end of the agreement, as an agreement to kill, or (*b*) a subordinate act towards the principal object, as in an agreement to support a true title by forged deeds or suborned witnesses. Again, the act may be unlawful (*a*) because it would be unlawful in each of the agreeing parties, even if he did it alone, or (*b*) because though lawful in one it is unlawful in two or more.

The first inquiry, then, which arises, is this: Was the principal object and end of the agreement illegal? I answer that that object and end was the acquisition of gain by the defendants. That is lawful, and, I suppose, even commendable, according to

(1) 11 Cl. & F. 155, at p. 233.

(2) *Mulcahy* v. *Reg.*, Law Rep. 3 H. L. 306 at p. 317.

the law of this country, provided the means used be lawful. What, then, were the means intended to be used? They were, as I have already said, the exclusion of competition in the remoter future by severe competition in the near future. Was that lawful or unlawful?

It is not necessary to consider whether competition directed by one man or by a combination of men against another man, if instigated and put in motion from mere malice and ill will towards him, as a means of doing him ill service, and for no benefit to the doer, would or would not be unlawful or actionable. There is in the present case no evidence of express malice or of any activity of the defendants against the plaintiffs, except as rival and competing shipowners. The defendants did not aim at any general injury of the plaintiffs' trade, or any reduction of them to poverty or insolvency; they only desired to drive them away from particular ports, where the defendants conceived that the plaintiffs' presence interfered with their own gain. The damage to be inflicted on the plaintiffs was to be strictly limited by the gain which the defendants desired to win for themselves. In the observations I am about to make I shall, therefore, lay out of consideration this case of competition used as a mere engine of malice, even where I do not in terms repeat the exception. I will only add on this part of the case that the charge of Erle, J., in the case of *Reg.* v. *Rowlands* (1), draws the same distinction which I have taken between combinations to promote the interests of those who combine, and combinations of which the hurt of another is the immediate purpose.

We have then to inquire whether mere competition, directed by one man against another, is ever unlawful. It was argued that the plaintiffs have a legal right to carry on their trade, and that to deprive them of that right by any means is a wrong. But the right of the plaintiffs to trade is not an absolute but a qualified right—a right conditioned by the like right in the defendants and all Her Majesty's subjects, and a right therefore to trade subject to competition. Now, I know no limits to the right of competition in the defendants—I mean, no limits in law. I am not speaking of morals or good manners. To draw a line between fair and

(1) 17 Q. B. 671.

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unfair competition, between what is reasonable and unreasonable, passes the power of the Courts. Competition exists when two or more persons seek to possess or to enjoy the same thing: it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition. I say mere competition, for I do not doubt that it is unlawful and actionable for one man to interfere with another's trade by fraud or misrepresentation, or by molesting his customers, or those who would be his customers, whether by physical obstruction or moral intimidation. The cases of *Garret* v. *Taylor* (1); *Tarleton* v. *McGawley* (2); *Keeble* v. *Hickeringill* (3); *Carrington* v. *Taylor* (4), are all cases of interference by physical acts, driving away either the birds or the customers from the plaintiffs' places of business. Other cases were cited in which one man has persuaded another who is under some contract of service to a third to break that contract to the damage of such third person, and the persuasion has been held actionable. But no case has been or, I believe, can be cited where the only means used by the defendant to injure the plaintiff has been competition pure and simple. I think that if we were now to hold interference by mere competition unlawful, we should be laying down law both novel and at variance with that which modern legislation has shewn to be the present policy of the State.

But if one man may by competition strive to drive his rival out of the field, is it lawful or unlawful for several persons to combine together to drive from the field their competitor in trade? It is said that such an agreement is in restraint of trade, and therefore illegal. Be it so. But in what sense is the word "illegal" used in such a proposition? In my opinion, it means that the agreement is one upon which no action can be sustained, and no relief obtained at law or in equity; but it does not mean that the entering into the agreement is either indictable or actionable. The authorities on this point are, I think, with a single exception, uniform. In *Mitchell* v. *Reynolds* (5) Parker, C.J.,

(1) Cro. Jac. 567.
(2) Peake, N. P. 270.
(3) 11 East, 574, n.
(4) 11 East, 571.
(5) 1 P. Wms. 181; 1 Sm. L. C. 430, 9th ed.

in discussing contracts in restraint of trade, says: "It is not a reason against them that they are against law, I mean, in a proper sense, for in an improper sense they are." In *Price* v. *Green* (1) Patteson, J., in delivering the judgment of the Exchequer Chamber upon a covenant held void as in restraint of trade, said expressly that it was "void only, not illegal." In *Hilton* v. *Eckersley* (2) the bond was addressed, not as in *Mitchel* v. *Reynolds* (3), only to negative acts, such as not trading, but to positive acts, such as carrying on works under particular directions, and closing the works at the dictation of a majority of the combining owners. In this case all the judges, both in the Courts of Queen's Bench and in the Exchequer Chamber, held that the bond could not be enforced; but Crompton, J., alone thought that it created an indictable offence, Lord Campbell, C.J., and Erle, J., expressing an opposite opinion, and the Court of Exchequer Chamber carefully abstaining from expressing any opinion on the point. The language of all the judges in the cases of *Hornby* v. *Close* (4) and *Farrer* v. *Close* (5) is consonant with that of Lord Campbell and Erle, J., in *Hilton* v. *Eckersley* (2), and Crompton, J., is, I believe, the only judge who has ever hitherto held such contracts illegal as well as void.

If every agreement in restraint of trade were not only void but unlawful in the stricter sense of the word, it would follow that, as every agreement must be between at least two persons, every such agreement would constitute an indictable offence, and yet not a single case has been cited of a conspiracy constituted by a mere agreement between two persons in undue restraint of the trade of one of the contractors. This silence of the books is very significant.

It was forcibly urged upon us that combinations like the present are in their nature calculated to interfere with the course of trade, and that they are, therefore, so directly opposed to the interest which the State has in freedom of trade, and in that competition which is said to be the life of trade, that they must be indictable. It is plain that the intention and object of the

(1) 16 M. & W. 346.
(2) 6 E. & B. 47.
(3) 1 P. Wms. 181; 1 Sm. L. C. 430, 9th ed.
(4) Law Rep. 2 Q. B. 153.
(5) Law Rep. 4 Q. B. 602.

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combination before us is to check competition; but the means it uses is competition, and it is difficult, if not impossible, to weigh against one another the probabilities of the employment of competition on the one hand and its suppression on the other; nor is it easy to say how far the success of the combination would arouse in others the desire to share in its benefits, and by competition to force a way into the magic circle. In *Wickens* v. *Evans* (1) it was suggested that the brewers or distillers of London might enter into an agreement to divide the metropolis into districts, the effect of which might be to supply the public with an inferior commodity at a higher price. This argument was met by Hullock, B., by this observation: "If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated; and the consequence would, perhaps, be, that the public would obtain the articles they deal in at a cheaper rate." A similar observation may be made in the present instance, and corroborated by what has actually happened. For the case before us strikingly illustrates the difficulty of foretelling the probable results of such a combination on the public interest; in fact, the competition between the plaintiffs and defendants in May and June, 1885, brought down the freights from Hankow, to the benefit, it must be supposed, of the consumer in England. The Conference came to an end in August, 1885, and in the summer of 1886 the rate of freight from Hankow was determined by free competition in an open market in which the defendants were competing with one another.

But I do not rest my conclusion on any speculations as to the probable effect of such agreements to the one before us, but on this: that the combination, if in restraint of trade, is, primâ facie, void only and not illegal; that no statute in force makes such competition criminal; and that the policy of our law, as at present declared by the legislature, is against all fetters on combination and competition unaccompanied by violence or fraud, or other like injurious acts.

The ancient common law of this country and the statutes with reference to the acts known as badgering, forestalling, regrating,

(1) 3 Y. & J. 318.

and engrossing, indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public; they were held criminal accordingly. But early in the reign of George III. the mind of the legislature shewed symptoms of change in this matter, and the penal statutes were repealed (12 Geo. 3, c. 71), and the common law was left to its unaided operation. This repealing statute contains in the preamble the statement that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, had a tendency to discourage the growth and to enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past; the indication of a new policy for the future.

This new policy has been more clearly declared and acted upon in the present reign; for the legislature has by 7 & 8 Vict. c. 24, altered the common law by utterly abolishing the several offences of badgering, engrossing, forestalling and regrating. At the same time this repeal was accompanied by a proviso that nothing in the Act contained should apply to the offence of knowingly and fraudulently spreading or conspiring to spread any false rumour with intent to enhance or decry the price of any goods or merchandise, or to the offence of preventing or endeavouring to prevent by force or threats any goods, wares, or merchandise being brought to any fair or market, but that every such offence might be punished as if this Act had not been made. The comparison of the operative part of the statute with this proviso goes far to draw the line between lawful and unlawful interference with the ordinary course of trade or of the market. A consideration of the statutes relative to trade unions leads me to a similar conclusion. It is not necessary to consider in detail the provisions of the statutes of 1871 and 1875 (34 & 35 Vict. c. 31, and 39 & 40 Vict. c. 22); but one of their principal results was to enlarge the power of combination between workmen and workmen, and between masters and masters, for the purpose of maintaining and enforcing their respective interests, and to remove the objection of being in restraint of trade, to which some

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of such combinations had been obnoxious. But whilst the legislature thus set masters and men respectively free to combine, they reasserted the illegality of using violence, threats, molestation, obstruction, or coercion; and here again the contrast between the two pieces of legislation which stand side by side in the statute-book, the one declaring mere combinations lawful, and the other declaring violence and other like acts unlawful, helps to draw the line in the same direction as does the legislation in respect of trade combination. (See the statutes 34 & 35 Vict c. 31, and c. 32.)

Thus the stream of modern legislation runs strongly in favour of allowing great combinations of persons interested in trade, and intended to govern or regulate the proceedings of large bodies of men, and thus, necessarily, to interfere with what would have been the course of trade if unaffected by such combinations. I, therefore, conclude that the combination in the present case cannot be held illegal, as opposed to the policy of the law.

It remains to inquire whether the authorities assist in the decision of the question before us. As regards an individual, I have already pointed out that for one man to interfere with the lawful trade or business of another by molestation or any physical interference, or by fraud or misrepresentation, may be an actionable wrong. But no authority appears to shew that for one man to injure the business of another by mere competition, even though it may be successfully directed to driving the rival out of the town where he dwells or out of the business which he carries on, is actionable. And the silence of the books is strong evidence that such acts are not actionable.

With regard to like acts done by a combination of persons, the authorities are not very numerous. There are certain general statements in text-books, of which the passage in Hawkins' Pleas of the Crown, vol. i., p. 446, may be taken as a fair specimen:— "There can be no doubt," he says, "but that all confederacies whatsoever, wrongfully, to prejudice a third person are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person." For this proposition Hawkins cites authorities relative to two cases: first, *Rex* v. *Kimberty* (1), which was a conspiracy to indict the

(1) 1 Levinz, 62.

prosecutor for having begotten a bastard child on the body of one of the conspirators; a case, therefore, which has nothing to do with the question now in hand; secondly, *Rex* v. *Sterling* (1), in which the indictment charged certain brewers of London with a conspiracy to refuse to sell small-beer, with a view to impoverish the excisemen, and with intent to move the common people to pull down the excise house, and to bring the excisemen into hatred of the people, and to impoverish and disable them from paying their rent to the King; the defendants were found guilty of counselling and assembling to impoverish the excisemen, and not guilty of the residue; and thereupon ultimately judgment went for the Crown. The real ground of the decision was, as stated by Holt, C.J., in *Reg.* v. *Daniell* (2), that the offence of the defendants was of a public nature and levelled at the Government, and it is therefore no authority in respect of a combination which has no such object or effect. But one argument as it appears in Siderfin is important. It was urged for the defendants that it was no offence punishable by our law for one man to depauperate another with a view to enrich himself, or by selling commodities at cheaper rates. The Court did not deny this proposition, but drew a distinction based upon the allegations of the information, which were supported by the verdict, that the excise was parcel of the revenue of the King, and that to impoverish the excisemen was to render them incapable of paying these revenues to the King. So far, therefore, as the case goes it is an authority rather for the defendants than for the plaintiffs in this case.

The next case that seems relevant is *Rex* v. *Eccles* (3), before Lord Mansfield and the Court of King's Bench. The defendant and six other persons had been convicted on two counts, charging that the defendants and others, devising unlawfully and by indirect means to impoverish one Booth, and to hinder him from exercising the trade of a tailor, conspired by wrongful and indirect means to impoverish him and to hinder him from exercising his said business, and that the defendants, according to their said conspiracy, did so hinder him. It was moved in arrest

(1) 1 Levinz, 126; 1 Siderfin, 174; and 1 Keble, 650, 655.
(2) 6 Mod. 99. (3) 1 Lea. C. C. 274.

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of judgment that the means by which the mischief was to be effected ought to have been set out, but the indictment was held sufficient. The nature of the acts done by the defendants does not appear, nor is it easy to learn precisely on what principle the Court proceeded. Lord Ellenborough, in *Rex* v. *Turner* (1), said that the case seemed to have been determined on the ground of restraint of trade—in which case it would probably be no authority since the legislation of this reign with reference to trade unions. If regarded as an authority merely on the sufficiency of the indictments, it appears open to some question. In any event, it throws no clear light on the matter now for decision.

The case of *Cousins* v. *Smith* (2) is probably not applicable, since it proceeded on the view of a Court of Equity of forestalling and regrating, and those practices are not now unlawful. The equitable shadow of these crimes must, I think, have disappeared with the crimes themselves.

These are, so far as I am aware, all the relevant authorities, and none of them appears to me to support the proposition that mere competition of one set of men against another man carried on for the purpose of gain and not out of actual malice is actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect.

For these reasons, I hold that the judgment of the Lord Chief Justice was right, and that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Gellatly & Warton.*
Solicitors for defendants: *Freshfields & Williams.*

(1) 13 East, 228. (2) 13 Ves. 542.

A. M.

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APPEAL—From county court—County court judge's notes—Duty of applicant to supply copies of notes for use on appeal
See PRACTICE. 4. [3

—— Court of—County court—Application for prohibition to—Action struck out for want of jurisdiction - - 229
See PRACTICE. 5.

—— Attachment—Habeas corpus—Disobedience to writ—Appeal to Court of Appeal 305
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—— Appeal to Court of Appeal—Re-hearing—Enlargement of time - - 477
See SOLICITOR.

ARBITRATION—*Application for Leave to revoke Submission—Arbitrator making a Mistake of Law in a Matter within his Jurisdiction*—3 & 4 *Wm.* 4, *c.* 42, *s.* 39.] Where parties have agreed to refer questions in dispute between them to arbitration, the mere fact that the arbitrator in the course of the proceedings making a mistake of law in a matter within his jurisdiction does not entitle the party dissatisfied with the arbitrator's view to come to the Court and claim as of right leave to revoke the submission. There is power to give leave to revoke the submission in such a case which may be exercised under exceptional circumstances, but it is a matter of discretion depending on the circumstances of the particular case.—Where an arbitrator had power by the terms of the reference to decide the question of liability before dealing with the question of damages, and the parties agreed that he should

ARBITRATION—*continued.*

exercise such power, and he accordingly did decide the question of liability before dealing with the damages:—*Held*, that the Court would not afterwards give the party against whom he had decided leave to revoke the submission on the ground that he had decided wrongly in point of law.—*East and West India Docks Co.* v. *Kirk and Randall* (12 App. Cas. 738) considered. JAMES *v.* JAMES - - - - - C. A. 12

ASSIGNMENT OF DEBT—*Mortgage—Charge—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.] A mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption and reconveyance upon repayment to the mortgagee, is "an absolute assignment (not purporting to be by way of charge only)" within s. 25, sub-s. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66).—*Burlinson* v. *Hall* (12 Q. B. D. 347) followed—*National Provincial Bank* v. *Hurle* (6 Q. B. D. 626) disapproved. TANCRED *v.* DELAGOA BAY AND EAST AFRICA RAILWAY CO. 239

ATTACHMENT of debts—Balance in hands of garnishee - - - - 236
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—— Habeas corpus—Disobedience to writ—Appeal to Court of Appeal - - 305
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BANKER—Inspection of books—Bankers' Books Evidence Act, 1879 - - 1
See PRACTICE. 11.

—— Income tax—Loan for less than a year—Deduction of income tax - - 324
See REVENUE.

—— Forged bill of exchange—Negligence—Estoppel - - - - 243
See BILL OF EXCHANGE.

BANKRUPTCY—*Small Bankruptcy—Solicitor's Bill of Costs—Taxation—Conveyancing Business—Bankruptcy Rules*, 1886, *r.* 112, *sub-ss.* 1, 2—*Appendix* (*Scale of Costs*), *Parts I. and II. Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)] Sub-s. 2 of rule 112 of the Bankruptcy

BANKRUPTCY—*continued.*

Rules, 1886 (which reduces a solicitor's charges by two-fifths "in all proceedings under the Act in which costs are payable out of the estate" where the estimated assets do not exceed 300*l.*) does not apply to conveyancing business, and the charges in respect of such business are regulated by rule 2 of the General Regulations in the Appendix to those Rules. In re Parfitt - 40

2. —— *Debt barred by Statute of Limitations—Part-payment for Purpose of renewing Liability—Fraudulent Preference*—46 & 47 *Vict. c.* 52, *s.* 4, *sub-s.* 1 (*c*), *s.* 48.] A debtor unable to pay his debts as they became due from his own money paid within three months of his being adjudged bankrupt part of a debt barred by the Statute of Limitations, with the object of renewing the debt and enabling the creditor to prove in the bankruptcy for the balance due The debt up to the date of such payment on account had always been treated by the debtor and the creditor as a subsisting debt, and one which it was intended should be ultimately paid—*Held*, that there was a sufficient part-payment to take the debt out of the operation of the Statute of Limitations.—*Semble*, per Field, J. Even if the money so paid on account could be recovered back on the ground that the payment was pro tanto a fraudulent preference, that would not prevent the payment from having the effect of reviving the debt. In re Lane. Ex parte Gaze - - - 74

3. —— *Evidence—Discovery of Bankrupt's Property and Dealings—Summons to attend Court for Examination—Illness of Person summoned—Power to direct Examination to be held out of Court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 27—*Bankruptcy Rules*, 1886, *r.* 66.] When a person, who has been summoned for examination under s. 27 of the Bankruptcy Act, 1883, for the purpose of giving information as to the property and dealings of a bankrupt, is unable through illness to attend the Court, the Court has power, under rule 66 of the Bankruptcy Rules, 1886, to order the examination to be held before an officer of the Court at the witness's own residence. In re Bradbrook. Ex parte Hawkins C. A. 226

4. —— *Discharge of Bankrupt—Misdemeanour under Debtors Act*, 1869—*Bankruptcy (Discharge and Closure) Act*, 1887 (50 & 51 *Vict. c.* 66), *s.* 2, *sub-ss.* 1, 3—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 13.] Sect. 2 of the Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), provides (1) that a debtor who has been adjudged bankrupt under the Bankruptcy Act, 1869, and who has not obtained his discharge, may apply to the Court for an order of discharge; and (3), that, on the hearing of the application, the Court may either grant, or refuse, or suspend the order of discharge, or may grant a conditional order; "provided that the Court shall refuse the discharge in all cases where the Court is satisfied by evidence that the debtor has committed any misdemeanour under Part 2 of the Debtors Act, 1862, or any amendment thereof":—*Held*, that the proviso has no application to a case in which the misdemeanour was committed after the adjudication of bankruptcy. In re Brockelbank. Ex parte Dunn & Raeburn - - C. A. 461

BIGAMY—Second marriage where husband or wife absent for less than seven years—Honest belief on reasonable grounds of death of husband or wife - - 168
See Criminal Law.

BILL OF EXCHANGE—*Estoppel—Banker—Forgery of Name of Payee—Payee a "fictitious or non-existing person"—Knowledge of Acceptor—Negligence—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3.] In an action by the plaintiff for a declaration that the defendants, his bankers, were not entitled to debit him with the amount of certain forged bills of exchange accepted by him, it appeared that V., a foreign correspondent of the plaintiff, was in the habit of drawing upon him, sometimes making the bills payable to the order of C. P. & Co., another foreign firm, and that a clerk in the plaintiff's employment forged the signature of V. to bills purporting to be drawn on the plaintiff by V. to the order of C. P. & Co., and resembling the genuine bills which V. was in the habit of drawing on the plaintiff, and that he placed among the plaintiff's correspondence counterfeit letters of advice with respect to these forged bills resembling the letters of advice ordinarily received from V. By these means the clerk procured the genuine acceptances of the plaintiff to the bills which he had forged. He then forged upon the bills indorsements purporting to be those of C. P. & Co., the payees named therein, and was paid by the cashiers of the defendants across the counter the amounts for which the bills were drawn. Before payment of the bills the defendants were advised by the plaintiff in the ordinary course of business that the bills were coming forward for payment:—*Held*, by Cotton, Lindley, Bowen, Fry, and Lopes, L.JJ. (Lord Esher, M.R., dissenting), that the defendants were not protected by s. 7, sub-s. 3, of the Bills of Exchange Act, 1882; that C P. & Co. were not "fictitious or non-existing" payees within the meaning of the sub-section; that "fictitious" meant fictitious to the knowledge of the party sought to be charged upon a bill; and that the defendants were not entitled to debit the plaintiffs with the amount of the forged bills paid as above mentioned:—*Held*, further, by the whole Court, that the plaintiff had not been guilty of negligence immediately connected with the transactions so as to disentitle him to recover. Vagliano Brothers *v.* Bank of England C. A. 243

2. —— *Fraud in Negotiation—Value "in good faith given"—Onus of Proof—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 30, *sub-s.* 2.] By s. 30, sub-s. 2, of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), it is enacted that "every holder of a bill is deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is effected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill":—*Held*, that when fraud is proved the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith without notice of the fraud. Tatam *v.* Haslar - - - - - 345

BILL OF SALE—*Registration — Building Agreement—Mortgage—Power of Mortgagee to enter—Sale of Materials—Power to sell Materials independent of Power of Entry—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 8.] By a mortgage deed the plaintiff assigned to the defendants certain land and buildings in course of erection thereon, "and also all bricks, timber, slates, and other building materials which may at any time hereafter be brought by or for the mortgagor into the said premises for completing the said buildings." —The plaintiff covenanted "that all bricks, timber, &c., which shall be brought upon the premises, &c., shall be considered as immediately attached to and forming part of the fee simple of and in the same premises, and no part of the said bricks, &c., shall be removed from the premises but with the concurrence of the mortgagees," and "that in case the mortgagor shall not proceed with the completion, &c., to the satisfaction of the mortgagees, it shall be lawful for the mortgagees to enter upon the premises and to seize and take possession of all bricks, &c., and other building materials, and to complete the said messuages."—The deed further provided that in case of default by the mortgagor it should be lawful for the mortgagees to sell all or any part of the hereditaments or premises, and all bricks, timber, slates, and other materials standing and being thereon, or on any part thereof, either together or in parcels, &c.:—*Held*, that, inasmuch as it gave a power to sell the building materials, which was independent of the power to enter upon and take possession of the premises, and might be exercised without the latter power being exercised, the deed was an assurance of personal chattels, or a licence to take possession of personal chattels as security for a debt, within the meaning of s. 4 of the Bills of Sale Act, 1878, and therefore was a bill of sale, and was void under s. 8 of the Act of 1882 for want of registration in respect of the personal chattels comprised therein.—*In re Yates, Batcheldor* v. *Yates* (38 Ch. D. 112), distinguished. CLIMPSON . COLES - - - - - 465

2. —— *Schedule—Inventory—Personal Chattels — Description — After-acquired Property — Keeping up Security—Implied Covenant —Collateral Security—Life Policy—"Defeasance or Condition"—Registration — Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.] By a bill of sale registered under the Bills of Sale Act (1878) Amendment Act, 1882, the grantor assigned, as security for a loan, "all and singular the several chattels and things specifically described in the schedule thereto annexed." The schedule described the chattels as "21 milch cows" on a farm belonging to the grantor, "and all goods, chattels and effects in or upon the premises belonging to" the grantor. As collateral security the grantor deposited with the grantee a policy of assurance on his life. There was no memorandum of the deposit, and the policy was not referred to in any way in the bill of sale. After the execution of the bill of sale the grantor sold several of the cows referred to in the bill of sale and bought others:—*Held*, by the Court of Appeal (Cotton, L.J., Fry, L.J., and Lopes, L.J.), affirming the judgment of Charles, J., first,

BILL OF SALE—*continued.*

that the policy of assurance, being merely a collateral security, was not a "condition or defeasance" requiring registration as part of the bill of sale under s. 10, sub-s. 3, of the Bills of Sale Act, 1878; secondly, that as the bill of sale contained no covenant, either express or implied, affecting after-acquired property, it did not extend to any of the stock brought on to the farm after the date of the bill of sale; and (reversing the judgment of Charles, J.) thirdly, Lopes, L.J., dissenting, that the words "21 milch cows" were not such a specific description of the chattels intended to be comprised in the bill of sale as to satisfy the requirements of s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882.—*Witt* v. *Banner* (20 Q. B. D. 114) distinguished. CARPENTER *v.* DEEN [C. A. 566

BISHOP — Ecclesiastical law — Decorations forbidden by law—Representation of illegality by inhabitants of diocese—Discretion of bishop to stop proceeding 414
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BOROUGH—Municipal corporation—Contract by —Borough rates, Misapplication of—Surplus of borough fund - - 492
See MUNICIPAL CORPORATION. 3.

CAB—Negligence of driver — Liability of proprietor - - - - 281
See HACKNEY CARRIAGE.

CASES—*Bebb* v. *Bunny* (1 K. & J. 216) distinguished - - - - 324
See REVENUE.

—— *Burlinson* v. *Hall* (12 Q. B. D. 347) followed
See ASSIGNMENT OF DEBT. [239

—— *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (19 Q. B. D. 242) distinguished - - - 342
See INSURANCE (MARINE).

—— *East and West India Docks Co.* v. *Kirk & Randall* (12 App. Cas. 738) considered
See ARBITRATION. [12

—— *Hope* v. *Evered* (17 Q. B. D. 338) followed
See MALICIOUS PROSECUTION. [45

—— *Hopton* v. *Robertson* (W. N. (1884) p. 77) approved - - - - 124
See PRACTICE. 19.

—— *La Mert, Ex parte* (4 B. & S. 582), approved and followed - - - 400
See MEDICAL PRACTITIONER.

—— *Meredith* v. *Holman* (16 M. & W. 798) followed - - - - 380
See STATUTE.

—— *Minet* v. *Morgan* (Law Rep. 8 Ch. 361) followed - - - - 332
See PRACTICE. 9.

—— *National Provincial Bank* v. *Harle* (6 Q. B. D. 626) disapproved - 239
See ASSIGNMENT OF DEBT.

—— *Newby* v. *Van Oppen* (Law Rep. 7 Q. B. 293) followed - - - 519
See PRACTICE. 15.

—— *O Neil* v. *Clason* (46 L. J. (Q.B.) 191) overruled - - - - 526
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—— *Reg.* v. *Liverpool* (*Justices of*) (11 Q. B. D. 638) distinguished - - 143
See Licensing Acts.

—— *Ryley, In re* (15 Q. B. D. 329) considered
See Sheriff. [373

—— *Venables* v. *Smith* (2 Q. B. D. 279) approved
See Hackney Carriage. [281

—— *Wheeler* v. *Le Marchant* (17 Ch. D. 675) commented on - - - 332
See Practice. 9.

—— *Witt* v. *Banner* (20 Q. B. D. 114) distinguished - - - - 566
See Bill of Sale. 2.

—— *Yates, In re* (38 Ch. D. 112) distinguished
See Bill of Sale. [465

CATTLE—Dishorning—Infliction of unnecessary pain - - - - - 203
See Criminal Law. 2.

CERTIORARI—*Costs—Municipal Corporation—Certiorari to quash Orders of Town Council—Liability of individual Members of Council.*] A rule having been made absolute for a certiorari against a municipal corporation to bring up and quash certain orders made by the town council for illegal payments out of the borough fund:—*Held*, that members of the town council who had joined in making such orders were liable to be ordered, on a separate application against them, to pay the costs of the certiorari. The Queen *v.* Vaile [483

—— Discretion — Local Government Acts — Illegal payment by local authority 66
See Local Government Acts.

CHAMBERS—Order of judge in chambers—Service of order when necessary - 126
See Practice. 13.

CHARGING ORDER—Fund in Court - 264
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CHILD, CUSTODY OF—Habeas corpus—Excuse for non-compliance with writ—Contempt
See Habeas Corpus. [305

CHURCH—Pew—Right appurtenant to house—Long user and acts of ownership—Presumption of legal origin - - 48
See Ecclesiastical Law.

—— Ecclesiastical law — Bishop — Decorations forbidden by law — Representation of illegality by inhabitants of diocese—Discretion of bishop to stop proceeding—Mandamus - - - 414
See Ecclesiastical Law. 2.

COAL—Penalties for sale of coal deficient in weight—Non-compliance with statutory mode of weighing—Metropolis Coal Act (1 & 2 Wm. 4, c. lxxvi.), s. 57 - 380
See Statute.

COMMITMENT, ORDER OF — Action against sheriff for taking defaulting debtor to prison within twenty-four hours of arrest —"Attachment for debt," meaning of
See Sheriff. [373

COMPANY—*Director—Gift by Promoter—Contract pending between Company and Promoter—Fiduciary Position of Director—Extent of Liability.*] A gift by a promoter of a company to a director whilst there are any questions open between the company and the promoter, must be accounted for by the director to the company, and the company has the option of claiming the thing given or its highest value whilst held by the director. Eden *v.* Ridsdales Railway Lamp and Lighting Company, Limited - C. A. 368

COMPENSATION — Manorial rights — Copyhold enfranchisement—Valuation by umpire—Determination of value by commissioners - - - - 59
See Copyhold Enfranchisement.

CONSPIRACY—*Combination to keep up Rate of Freight—Engrossing particular Trade—Exclusion of Rival Traders from Combination.*] The defendants, who were firms of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of 5 per cent. on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and in consequence of such exclusion sustained damage:—*Held* (by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting), affirming the judgment of Lord Coleridge, C.J., that the association being formed by the defendants with the view of keeping the trade in their own hands, and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for conspiracy was maintainable. Mogul Steamship Company *v.* McGregor, Gow, & Co. - 598

CONTRACT — Municipal corporation — Borough rates, misapplication of — Surplus of borough fund - - - 492
See Municipal Corporation. 3.

COPYHOLD ENFRANCHISEMENT — *Compensation for Manorial Rights—Valuation by Umpire—Remitting Valuation erroneous in Amount—Refusal to amend—Determination of Value by Commissioners—Copyhold Act*, 1887 (50 & 51 *Vict. c.* 73), *s.* 11.] By s. 11 of the Copyhold Act, 1887: "The valuers appointed under the provisions of the Copyhold Acts shall determine the value of the manorial and other rights and incidents, such value to be a gross sum of money, and their decision shall be in such form as the Commissioners may prescribe, and they shall in every case deliver the details of the valuation to the Commissioners, and, if it shall appear to the Commissioners that the valuation is imperfect or erroneous, they may remit it for reconsideration or correction; and if the valuers neglect or refuse to amend the same the Commissioners may, after due notice to the lord and to the tenant, and after fully considering all the circumstances brought before them, determine the value of the manorial and other rights and incidents at such a sum as they may deem just and reasonable."—On a valuation of manorial rights under the Act it appeared to the Commissioners that the valuation was erroneous in amount, and they remitted it to the

COPYHOLD ENFANCHISEMENT—*continued.*

valuer, who refused to amend. The Commissioners thereupon proceeded to consider the circumstances with a view to themselves determining the value. On an application for a prohibition to restrain them from proceeding to determine the value except as appeared by the award:—*Held* (reversing the decision of the Queen's Bench Division), that the Commissioners were acting within their jurisdiction in proceeding to determine the value of the rights, as the authority given them by the statute applies where, in their opinion, the valuation is erroneous in amount. THE QUEEN *v.* THE LAND COMMISSIONERS OF ENGLAND - - - - - C. A. 59

CORPORATION—Writ—Service—Scotch corporation with branch office in England 285
See PRACTICE. 17.

—— Foreign corporation carrying on business in England - - - - 526
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CORRUPT PRACTICE—Election petition—Trial—Order by Court for prosecution of offender - - - - 273
See MUNICIPAL CORPORATION. 2.

COSTS — Taxation — Solicitor — Disbursement—Probate duty - - - 5
See PRACTICE.

—— Judgment under Order XIV. for 20*l.* or upwards, part of claim—Judgment at trial for balance—Less than 50*l.* recovered 8
See PRACTICE. 2.

—— Bankruptcy—Lower scale — Conveyancing business—Small bankruptcy - 40
See BANKRUPTCY.

—— Jurisdiction of judge to deprive plaintiff of costs—"Good cause" - - 335
See PRACTICE. 3.

—— Municipal corporation—Certiorari to quash orders of town council—Liability of individual members of council - 483
See CERTIORARI.

COUNTY COUNCIL—*Election as Member—Disqualification of Women—Votes thrown away—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 11, *sub-s.* 3, *s.* 63—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 2.] At an election of members of a county council under the Local Government Act, 1888, the respondent obtained a majority of votes over the petitioner and was declared to be elected. On a petition claiming the seat on the ground that the respondent, being a woman, was disqualified:—*Held*, that an appeal lies in such case, by special leave, from the Divisional Court to the Court of Appeal:—*Held* also (affirming the judgment of the Queen's Bench Division) that women are incapacitated from being elected members of a county council:—*Held* further, that the votes given to the respondent were thrown away and that the petitioner was duly elected. BERESFORD-HOPE *v.* LADY SANDHURST - - - - - C. A. 79

2. —— *Election—Nomination Paper—Signature—Addition of Word "Junior"—Name in Register without Addition—Validity of Nomination—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41).] The nomination paper for the election of a county councillor was signed by a nominator "James Sykes, junr." The name James Sykes appeared in the register of county electors without the addition of the word "junior." The number set against the name in the nomination paper and in the register was the same. The usual signature of the nominator was "James Sykes, junr.," and he was generally known as James Sykes, junr., although his father was dead:—*Held*, that the nomination paper, being signed with the ordinary signature of the nominator, was valid. GLEDHILL *v.* CROWTHER - - - 136

3. —— *Election—Nomination Paper—Omission of Name of Electoral Division*—51 & 52 *Vict. c.* 41 (*Local Government Act*, 1888), *s.* 75—45 & 46 *Vict. c.* 50 (*Municipal Corporations Act*, 1882), *s.* 72.] The deputy returning officer for an electoral division of a county supplied for use at an election of a county councillor printed nomination forms in which the name of the division did not appear, but space was left for it. A candidate was nominated by one of such forms, which was signed by the nominators and delivered to the officer without the name of the division having been inserted:—*Held*, that the omission was a "mistake in the use of the form" within s. 72 of the Municipal Corporations Act, 1882, as incorporated with the Local Government Act, 1888, and did not affect the validity of the nomination. MARTON *v.* GORRILL - - - - 139

COUNTY COURT—Appeal to High Court—County court judge's notes—Duty of appellant to supply copies of notes for use on appeal - - - - 3
See PRACTICE. 4.

—— Prohibition—Appeal to Court of Appeal
See PRACTICE. 5. [229

COVENANT — Covenant running with land — Lease of public-house — Covenant to conduct business in such manner as to afford no ground or pretext whereby public-house licences might be or be in danger of being suspended, discontinued or forfeited - - - - 35
See LANDLORD AND TENANT.

CRIMINAL LAW—*Bigamy—Mens Rea—Second Marriage where Husband or Wife absent for less than Seven Years—Honest Belief on reasonable Grounds of Death of Husband or Wife*—24 & 25 *Vict. c.* 100, *s.* 57.] The prisoner was convicted under 24 & 25 Vict. c. 100. s. 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead:—*Held*, by Lord Coleridge, C.J., Hawkins, Stephen, Cave, Day. A. L. Smith, Wills, Grantham and Charles, JJ. (Denman, Field, and Manisty, JJ., and Pollock and Huddleston, BB., dissenting), that a bonâ fide belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong. THE QUEEN *v.* TOLSON - - C. C. R. 168

CRIMINAL LAW—*continued.*

2. ——, *Cruelty to Animals—Dishorning Cattle—Infliction of Unnecessary Pain*—12 & 13 *Vict. c.* 92, *s.* 2.] By 12 & 13 Vict. c. 92, s. 2, "if any person shall cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal," every such offender shall be liable to a penalty.—At the hearing of an information under s. 2 against the respondent, a farmer in Norfolk, for ill-treating, abusing and torturing a number of oxen, it appeared that he had caused their horns to be sawn off, and evidence was given by scientific witnesses that this operation caused extreme and prolonged pain, and was cruel, and absolutely unnecessary; that dishorning was not practised in other counties of England, and had long been discontinued in Norfolk, and only revived within four years in one part of that county; and that goring was prevented by "tipping" the horns, or by removing the core before the animal was six months old, which caused only trifling pain. For the defence, evidence was given by farmers that dishorning changed the character of the animals, rendered them quiet, prevented them from goring and ill-treating others, made them graze better and fatten more quickly, enabled a greater number of them to be stowed in a yard or railway truck, and slightly increased the value of each animal, and that "tipping" the horns was of no benefit.—The justices were of opinion that the dishorning had caused considerable pain and suffering to the animals, that the respondent had exercised ordinary care in the operation, that the practice had been carried on in a part of the county of Norfolk to a considerable extent during the past three or four years, that the results attained by dishorning would not be attained by merely tipping the horns, that the respondent had not any cruel intention, but acted under the honest belief that the operation was for the benefit of the animals themselves, and as well for the benefit of himself as a grazier, and that the object he had in view could not be attained by any known method; they accordingly dismissed the information.—*Held*, that the operation of dishorning caused extreme pain without adequate and reasonable object, and was unnecessary abuse of the animal, and therefore unjustifiable, and that the respondent ought to have been convicted. Ford *v.* Wiley - - - - 203

3. —— *False Pretences—"Prepared to pay"—Valuable Security*—24 & 25 *Vict. c.* 96, *s.* 90.] The prisoner was convicted on an indictment charging that by the false pretence to the prosecutors that he "was prepared to pay to them or one of them" 100*l.*, he did then unlawfully and fraudulently induce the prosecutors to "make a certain valuable security," to wit, a promissory note for 100*l.*, with intent thereby to defraud them.—*Held*, first, that the indictment was good, as it must be taken by necessary inference to allege a false pretence by the prisoner of an existing fact, viz., that he was prepared to pay the prosecutors 100*l.*, and had the money ready for them on their signing the promissory note; secondly, that the indictment shewed an offence within 24 & 25 Vict. c. 96, s. 90, of fraudulently causing a person to "make a valuable security" although the promissory note in question might not be of value until it had been delivered into the hands of the prisoner. The Queen *v.* Gordon [C. C. R. 354

—— Criminal Law Amendment Act—Issue of warrant - - - - 45
See Malicious Prosecution.

—— Warrant, issue of - - - 272
See Malicious Prosecution. 2.

CRUELTY TO ANIMALS—Dishorning cattle—Infliction of unnecessary pain - 203
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DEFAMATION—Action against proprietor of newspaper—Admission of publication—Interrogatories as to name of writer of alleged libel - - - 384
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—— Libel—Payment into Court with defence denying liability—Justification of part of words used and payment into Court as to remainder - - - - 388
See Practice. 14.

—— Privilege—General Council of Medical Education—Removal of name from register—Publication of minutes of general council - - - - 400
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DIRECTOR—Company—Gift by promoter 368
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DISBURSEMENT—Solicitor—Costs—Transaction—Probate duty - - - 5
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—— Libel—Action against proprietor of newspaper—Admission of publication—Interrogatories as to name of writer of alleged libel - - - 384
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DISQUALIFICATION—Woman—County council—Election to member—Votes—Thrown away - - - - - 78
See County Council.

ECCLESIASTICAL LAW—*Church—Pew—Right appurtenant to House—Long User and Acts of Ownership—Presumption of Legal Origin—Faculty—Previous Invalid Grant by Churchwardens.*] Where the successive owners of a house have had a long-continued enjoyment of a pew in a parish church, and have done a number of acts with regard to it inconsistent with mere possession by

ECCLESIASTICAL LAW—*continued.*
permission of the churchwardens, the grant of a faculty at some time should be presumed, although no evidence is given of such grant, and although there may be evidence that the pew was originally acquired under circumstances that would not confer a legal right. HALLIDAY *v.* PHILLIPS [C. A. 48

2. —— *Bishop—Decorations forbidden by law—Representation of Illegality by Inhabitants of Diocese—Discretion of Bishop to stop Proceedings—Mandamus—Public Worship Regulation Act,* 1874 (37 & 38 *Vict.* 85), *ss.* 8, 9.] By s. 9 of the Public Worship Regulation Act, 1874, where a representation, under s. 8, has been sent to the bishop of the diocese complaining of unlawful alterations in or additions to the fabric or ornaments of a cathedral church, he shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the Act, "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state his reasons in writing."—A representation was sent to the Bishop of London complaining that the dean and chapter of St. Paul's Cathedral Church had set up on a reredos in that church a figure, five feet in height, of our Lord upon the cross, in a conspicuous position immediately above the communion table, and a figure, 5 ft. 6 in. in height, of the Virgin with the Child in her arms, in a conspicuous position above the figure of our Lord, and that each of those figures tended to encourage ideas and devotions of an unauthorized kind, and were unlawful. —The bishop replied that, having in pursuance of the statute considered the whole circumstances of the case, he was of opinion that proceedings should not be taken; stating, in substance, as his reasons, that the main question of principle at issue had already been decided in *Phillpotts* v. *Boyd* (Law Rep. 6 P. C. 435), in which a reredos, showing a figure of our Lord in the act of ascending into heaven, in a conspicuous position immediately above the communion table, was held to be lawful; that it appeared impossible to say that the difference between the two erections was of very grave importance, or that one offered serious temptations to idolatry and the other did not; that litigation in such matters, even where necessary in order to settle disputed matters of grave importance, was a necessary evil, keeping up irritation and party strife, embittering men's feelings, inflicting much mischief on the Church and on true religion; and only tolerable in order to prevent worse mischief that would otherwise follow; and he was satisfied that, in the present instance, the proceedings could not end in any result which would make up to the Church, and to the religious life of the country, for the mischief which the litigation itself must inflict on them.—On an application by the complainants for a mandamus to compel the bishop to act in furtherance of the proceedings in one of the ways prescribed by the statute:—*Held*, by Lord Coleridge, C.J., and Manisty, J. (Pollock, B., dissenting), that the reasons given by the bishop for his decision were not reasons contemplated by the statute, or founded upon a consideration of "the whole circumstances of the case," within the meaning of s. 9; and that, having failed to exercise his discretion within the statutory limits, the Court could review the bishop's decision, and ought to issue the mandamus.—By Pollock, B. The bishop's reply sufficiently shewed that he had considered "the whole circumstances of the case," and the Court had, therefore, no power to review his discretion, or his reasons for exercising it in a particular way. THE QUEEN *v.* BISHOP OF LONDON [414

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—— County council—Nomination paper—Omission of name of electoral division 139
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—— Petition—Municipal corporation—Trial—Corrupt practice—Order by Court for prosecution of offender - - 273
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FRAUDULENT PREFERENCE—Debt barred by Statute of Limitations—Part payment for purpose of renewing liability 74
See BANKRUPTCY. 2.

GAME—*Licensed Dealer—Close Time—Possession of foreign Partridges after Expiration of Season—Game Act*, 1831 (1 & 2 *Wm.* 4, *c.* 32), *ss.* 3, 4.] A person licensed to deal in game by virtue of the Game Act, 1831 (1 & 2 Wm. 4, c. 32), was convicted under s. 4 of knowingly having in his shop game during the close season, as defined in s. 3.—It appeared that game was exposed for sale in his shop during the close season, but that it had been killed abroad:—*Held*, by Lord Coleridge, C.J., and Hawkins, J. (Manisty, J., dissenting,, that the Act did not apply to birds killed abroad, and that the conviction was wrong. GUYER *v.* THE QUEEN - - - 100

GARNISHEE ORDER—Balance in hand of garnishee - - - - 236
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GOODWILL—Agreement for sale—Stamp—Ad valorem duty - - - 579
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HABEAS CORPUS—*Return—Excuse for Non-compliance with Writ—Contempt—Practice—Attachment—Appeal—"Criminal Cause or Matter" -Judicature Act*, 1873, *s.* 47.] To a writ of habeas corpus issued at the instance of the parent of a child, which had been wrongfully detained by the defendant, a return was made by the defendant to the effect that, as he had, before the issuing of the writ, parted with the custody of the child so detained by him to another person who had taken her out of the jurisdiction, it was impossible for him to obey the writ:—*Held*, that it was no excuse for non compliance with the writ that the defendant had wrongfully handed over the child to another person, and, therefore, that the return was bad, and an attachment must issue against the defendant for disobedience to the writ.—An appeal lies to the Court of Appeal against an order for an attachment for disobedience to a writ of habeas corpus. THE QUEEN *v.* BARNARDO - - - C. A. 305

HACKNEY CARRIAGE—*Negligence of Driver—Liability of Proprietor—Metropolitan Hackney Carriages Acts*, 1 & 2 *Wm.* 4, *c.* 22, *and* 6 & 7 *Vict. c.* 86.] Under the Metropolitan Hackney Carriage Act, 1843, so far as the public is concerned, the proprietor of a hackney carriage is responsible for the acts of the driver whilst plying

HACKNEY CARRIAGE—*continued.*
for hire, as if the relationship of master and servant existed between them. *Venables* v. *Smith* (2 Q. B. D. 279) approved. KING *v.* LONDON IMPROVED CAB COMPANY - - C. A. 281

HIGHWAY—*Locomotive—Licence—Exemption—"Locomotive used solely for agricultural purposes"—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 32.] A locomotive which is sometimes let out by its owner to farmers for the purpose of carrying straw and manure for use in farming operations, and which is sometimes used by the owner himself for the purpose of carrying for hire straw and manure to be used exclusively on farms, and is not used for any other purpose, is within the exemption in s. 32 of the Highways and Locomotives (Amendment) Act, 1878, as being "a locomotive used solely for agricultural purposes," and may be so used without a licence from the county authority. ELLIS & CO. *v.* HULSE - - - - - 24

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—— Metropolis—Power to seize things on footway or carriageway without conviction [486
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HUSBAND AND WIFE—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 13–15)—*Liability of Husband for Wife's ante-nuptial Debt—Judgment recovered against the Wife in respect of her Separate Estate—Action against Husband—Statute of Limitations.*] A judgment having been recovered by the plaintiff in an action brought against a married woman under the Married Women's Property Act, 1882, s. 13, for a debt incurred by her before marriage, but such judgment remaining unsatisfied because she had no separate estate, an action for the debt was afterwards brought by the plaintiff against the husband who had acquired property from his wife to an amount exceeding the debt:—*Held*, that the judgment recovered against the wife was no defence to the action against the husband.—A husband cannot be made liable under the provisions of the Married Women's Property Act, 1882, ss. 14, 15, for an ante-nuptial debt of the wife which accrued due against the wife more than six years before the commencement of the action. BECK *v.* PIERCE - - C. A 316

ILLEGALITY—Combination to keep up rate of freight—Engrossing particular trades—Exclusion of rival traders from combination - - - - - 598
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—— Licensing Acts—Licence—Renewal—Justices—Mandamus - - - 502
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INSPECTION—Banker's books—Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11, s. 7 - - - - - - 1
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INSURANCE AGAINST ACCIDENT—*Exception of Accident caused by "exposure of the insured to obvious risk."*] A policy of insurance against accidental death or injury excepted from the risks insured against accidents happening "by exposure of the insured to obvious risk of injury." The insured met his death through attempting in broad daylight to cross the main line of a railway in front of an approaching train by which he was run over and killed. There was no evidence that he was short-sighted or deaf. At the place where the accident happened there was no station or proper crossing; and there was no obstruction to prevent a person about to cross from seeing an approaching train. There was no ground for imputing negligence to the servants of the railway company:—*Held*, that, the risk incurred by the insured being one, which either was obvious to him, or would have been obvious to him, if he had been paying reasonable attention to what he was doing, the case came within the exception in the policy. CORNISH *v.* ACCIDENT INSURANCE COMPANY - - - - C. A. 453

INSURANCE (FIRE)—*Slip of Policy, Effect of.*] The plaintiffs, a firm of merchants in New Zealand, in October, 1886, employed a firm of insurance brokers in London to effect for them insurances against fire upon goods in New Zealand. The brokers instructed B., an insurance broker at Lloyd's, to effect a portion of the insurances, and B. prepared a slip containing particulars of the risk, which was initialed by the defendant and other underwriters at Lloyd's. Owing to a misunderstanding between the insurance brokers no policy was put forward for signature by the defendant and the other underwriters, and in February, 1887, the goods in New Zealand were seriously damaged by fire. No premiums had then been paid, but two days after the fire the insurance premiums were paid by the plaintiffs to the insurance brokers. A policy was then tendered to the defendant for signature, but he refused to sign it or to pay the amount for which he had initialed the slip. In an action to recover the amount:—*Held*, that the slip formed a complete and binding contract of insurance, that it was not subject to an implied condition that a policy should be put forward for signature within a reasonable time, and that, in the absence of circumstances shewing an intention on the part of the plaintiffs to abandon the insurance, they were entitled to recover. THOMPSON *v.* ADAMS - 361

INSURANCE (MARINE) — *Mutual Insurance Company—"Improper Navigation."*] By the rules of the defendants, a shipowners' mutual insurance association, the plaintiffs were entitled to protection in respect of "damage to goods on board when caused by the improper navigation" of their ship, but were not entitled to claim in respect of "damage caused by improper stowage." —A cargo of wheat while in the hold of the plaintiffs' ship was damaged, owing to a taint communicated to the wheat through the ceiling and limber boards of the vessel having been saturated with a composition which had leaked from the previous cargo. The ceiling and limber boards had not been properly cleaned before the wheat was stowed:—*Held* (affirming the judgment of Charles, J.), that the damage was not caused by "improper navigation." — *Quære*, whether it was caused by "improper stowage."—*Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (19 Q. B. D. 242) distinguished. CANADA SHIPPING COMPANY *v.* BRITISH SHIPOWNERS' MUTUAL PROTECTION ASSOCIATION [C. A. 342

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JUDGMENT—Setting aside — Service of order when necessary — Affidavit shewing merits, necessity for - - 124
See PRACTICE. 19.

LANDLORD AND TENANT—*Covenant running with Land—Action by Assignee of Reversion—Lease of Public-house—Covenant to conduct Business in such manner as to afford no Ground or Pretext whereby Public-house Licences might be or be in danger of being suspended, discontinued, or forfeited—Conviction of Tenant—No Indorsement on Licence—Forfeiture—Licensing Acts*, 1872 *and* 1874 (35 & 36 *Vict. c.* 94, *and* 37 & 38 *Vict. c.* 49).] In the lease of a public-house the lessee covenanted that he would "conduct and manage the business of an inn, tavern, or beerhouse keeper, in such proper and orderly manner as to afford no ground or pretext whatever whereby the licence or licences should or might be suspended, discontinued, forfeited, or be in any danger of being suspended, discontinued, or forfeited." The lease contained a clause of re-entry for breach of covenant. A person who occupied by leave of the lessee was convicted of selling drink within prohibited hours, but the conviction was not indorsed on the licence. The assignee of the reversion on the lease having brought an action to enforce the right of re-entry on the ground of a breach of covenant:—*Held*, first, that the covenant ran with the land, and might be enforced by the assignee of the reversion; secondly, that in the circumstances there had been no breach of the covenant. FLEETWOOD *v.* HULL - - - - - - 35

2. —— *Housing of the Working Classes Act*, 1885 (48 & 49 *Vict. c.* 72), *s.* 12—*Implied Condition as to State of Premises—Right to recover Damages for Breach.*] By s. 12 of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), "in any contract for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation":—*Held*, that a tenant has, under that section, a right to sue his landlord for damages for

LANDLORD AND TENANT—*continued.*
injuries caused by the premises not being reasonably fit for human habitation owing to any defective state of repair. WALKER *v.* HOBBS & CO. [458

LIBEL—Action against proprietor of newspaper—Admission of publication—Interrogatories as to name of writer of alleged libel - - - - - 384
See PRACTICE. 10.

—— Payment into Court with defence denying liability—Justification of part of words used and payment into Court as to remainder—Embarrassing pleading 388
See PRACTICE. 14.

—— Privilege—General Council of Medical Education—Removal of name from Register—Publication of Minutes of General Council - - - - 400
See MEDICAL PRACTITIONER.

LICENSING ACTS—*Licence—Disqualification of Licensed Person—Application by Owner of Premises for New Licence—9 Geo. 4, c. 61, s. 14—37 & 38 Vict. c. 49. s. 15.*] Where a licensed person has become personally disqualified or has had his licence forfeited the owner of the premises cannot apply under 9 Geo. 4, c. 61, s. 14, for a renewal of the licence, but must apply under 37 & 38 Vict. c. 49, s. 15, for the grant of a new licence, and such application must be made to the next special sessions.—*Reg.* v. *Justices of Liverpool* (11 Q. B. D. 638) distinguished. STEVENS *v.* GREEN 143

2. —— *Licence—Renewal—Notice of Intention to oppose—Adjournment of Licensing Meeting—Jurisdiction to entertain Objection—Mandamus to Justices to hear and determine—Sufficiency of Return—35 & 36 Vict. c. 94, s. 42.*] By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 42, "Where a licensed person applies for a renewal of his licence . . . the justices shall not entertain any objection to the renewal of such licence . . . unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting . . . Provided that the licensing justices may, notwithstanding that no such notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard, and the objection considered, as if the notice hereinbefore prescribed had been given."—A licensed person applied at the general annual licensing sessions for a renewal of his licence. No notice of intention to oppose the renewal was given, but the licensing justices refused the application. A mandamus issued commanding the justices to hold an adjournment of the general annual licensing meeting, and to hear and determine the merits of the application, or shew cause to the contrary. The justices returned that they had heard and determined the matter of the application:—*Held*, on the argument of a point of law raised on the reply to the return, that the justices were not bound to grant the renewal at the adjourned meeting, but had jurisdiction to entertain the objection and refuse the application, and therefore the return was sufficient. THE QUEEN *v.* HOWARD - - - 502

LICENSING ACTS—*continued.*

—— Lease of public-house—Covenant to conduct business so as not to risk forfeiture of licence—Action by assignee of reversion
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LIMITATIONS, STATUTE OF—Part-payment for purpose of renewing liability—Fraudulent preference - - - 74
See BANKRUPTCY. 2.

—— Real property—Sewering and paving—Recovery of expenses—Charge upon premises - - - - 149
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—— Husband and wife—Liability of husband for wife's ante-nuptial debts - 316
See HUSBAND AND WIFE.

LOCAL GOVERNMENT ACTS—*Officer of Local Authority—Payment of Commission on Contracts with Local Authority—Illegal Payment by Local Authority—Disallowance of—Discretion—Allowance in addition to Salary—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 189, 193—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 141, 226.*] A local authority employed one of their officers, apart from his ordinary duties, to superintend the execution of certain works on their behalf, upon the terms that he should be paid for his services by a commission upon the contract price of such works, whereby he became "interested" in the contract for the works contrary to the provisions of s. 193 of the Public Health Act, 1875. The officer duly superintended the execution of the works, and the local authority passed resolutions for the payment of, and paid him, the amount of the stipulated commission. On application for a certiorari to bring up such resolutions for the purpose of quashing them, it was admitted by the defendants that the payment was invalid, but it was contended that a fixed sum equal to the amount of the commission might have been lawfully paid to the officer as an "allowance" under s. 189 of the Public Health Act, 1875, and that, the invalidity of the payment being in form rather than in substance, the Court in the exercise of their discretion ought to refuse the application:—*Held*, that the payment being illegal the application must be granted.—*Semble*, that the term "allowance" in s. 189 does not include an allowance of money. THE QUEEN *v.* MAYOR, &c., OF RAMSGATE - - - - - 66

2. —— *Paving Expenses—Recovery of—Charge upon the Premises—Limitation of Actions—Local Government Act, 1858 (21 & 22 Vict. c. 98), ss. 62, 63—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8.*] Where a local authority had incurred expenses which by s. 62 of the Local Government Act, 1858 (corresponding to s. 257 of the Public Health Act, 1875), were made a charge upon the premises in respect of which the same were incurred:—*Held*, that such expenses became a charge upon the premises at the date at which they were incurred, and that the period of twelve years limited by the Real Property Limitation Act, 1874, s. 8, commenced to run from that date. HORNSEY LOCAL BOARD *v.* MONARCH INVESTMENT BUILDING SOCIETY - 149

LOCAL GOVERNMENT ACTS—*continued.*

3. —— *Officer of Local Authority—Acceptance of Fee or Reward under Colour of Office—"Allowance" in addition to Salary—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 189, 193. The council of a borough, being also the local sanitary authority under the Public Health Act, 1875, appointed the defendant, a solicitor and the town clerk of the borough, to be clerk to the sanitary authority; and by a resolution of the council the defendant's salary was fixed at a certain sum "to include all legal charges except for contentious business matters, travelling expenses and payments out of pocket." Subsequently the council, as local sanitary authority, promoted a sewage scheme, which had not been contemplated when the defendant's salary was fixed, and in connection with this scheme the defendant did work, partly in respect of contentious and partly in respect of non-contentious matters. On the completion of the sewage works the council passed a resolution that the defendant be paid a sum of money for his services in connection with the scheme; and the money was duly paid to and received by him:—*Held*, that the facts did not shew an acceptance by the defendant under colour of his office or employment of a fee or reward other than his proper salary, wages and allowances within the meaning of s. 193 of the Public Health Act, 1875, and that he was not liable to the penalty imposed by the section.—*Semble*, the word "allowances" in s. 193 of the Public Health Act, 1875, includes extra payments for extra work, and is not limited to allowances in respect of lodgings, coals, gas, and other like matters. EDWARDS *v.* SALMON [C. A. 531

4. —— *Rural Authority—Powers for lighting District—Order of Local Government Board—Assessment of Railway Company—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 161, 211, 229, 276.] The Local Government Board having made an order under s. 276 of the Public Health Act, 1875, directed that the provisions of the first paragraph of s. 161 (respecting the powers of urban authorities for lighting their districts) should be in force within certain contributory districts of a rural sanitary authority, and that the rural authority should be invested with the powers, &c., of the urban authorities "under those provisions," the rural authority issued their precept under s. 230 for payment of the lighting expenses. A railway company who had property in one of the contributory districts claimed to be assessed at one-fourth only of the rateable value of their property under s. 211:—*Held*, first, that the expenses were general, and not special expenses under s. 229:—Secondly, that, on the true construction of the order of the Local Government Board, the rural authority were not invested with the powers of rating of the urban authority, but were only entitled to issue the precept under their ordinary powers; and consequently the railway company must be rated at the full rateable value of their property LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* ASSESSMENT COMMITTEE OF BOLTON UNION - - - - C. A. 555

—— Action for injunction—Damages in substitution for injunction - - - 294
See NOTICE OF ACTION.

LOCOMOTIVE—Licence—Exemption—Locomotive used solely for agricultural purposes *See* HIGHWAY. [24

LUNATIC—*Charging Order on Fund—Fund in Court—Judgment Debt*—1 & 2 *Vict. c.* 110, *s.* 14; 3 & 4 *Vict. c.* 82, *s.* 1.] By 1 & 2 Vict. c. 110, s. 14, "if any person against whom any judgment shall have been entered up" in a superior court "shall have any Government stock, funds," &c., "standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior Courts on the application of any judgment creditor to order that such stock, funds," &c., "or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor."—By 3 & 4 Vict c. 82, the aforesaid provisions are extended, and by s. 1 it is enacted that "whenever any such judgment debtor shall have any interest in any such stock, funds," &c., "standing in the name of the Accountant-General of the Court of Chancery . . . . it shall be lawful for such judge to make any order as to such stock, funds,' &c., "in the same way as if the same had been standing in the name of a trustee of such judgment debtor . . . ."—On an application at chambers, under the above Acts, by the judgment creditor of a debtor found lunatic by inquisition, for a charging order on funds standing in the books of the Paymaster-General of the Chancery Division to the credit of the debtor, who was described in such books as "a person of unsound mind," the learned judge ordered that "so much of the defendant's interest in the fund so standing as aforesaid should stand charged with the payment of the . . . . amount due on the judgment as the Lords Justices sitting in Lunacy might deem applicable to payment of the judgment debt":—*Held*, that the Acts gave the judge no power to make an order providing that the amount to be charged should be determined by the Lords Justices, and that the creditor was entitled to an unconditional order on a specified amount of the fund. HORNE *v.* POUNTAIN - - - 264

MALICIOUS PROSECUTION—*Criminal Law—Criminal Law Amendment Act—Issue of Warrant—Judicial Act.*] By 48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 10: "If it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is bonâ fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorizing any person named therein to search for . . . such woman or girl. . . . The justice of the peace issuing such warrant may, by the same or any other warrant, cause any person accused of so unlawfully detaining such woman or girl to be apprehended and brought before a

MALICIOUS PROSECUTION—*continued.*
justice, and proceedings to be taken for punishing such person according to law":—*Held*, that the act of the justice in issuing a warrant under this section for the arrest of the person accused is a judicial act, and is an answer to an action for malicious prosecution against the person on whose information the justice has acted.—*Hope* v. *Evered* (17 Q. B. D. 338) followed. Lea v. Charrington [45

2. —— *Criminal Law—Criminal Law Amendment Act*, 1885—*Issue of Warrant—Judicial Act.*] Lea v. Charrington - - - C. A. 272

MANDAMUS — Bishop — Ecclesiastical law — Decorations forbidden by law—Representation of illegality by inhabitants of diocese—Discretion of bishop to stop proceedings - - - - 414
See Ecclesiastical Law. 2.

—— Justices — Licensing Acts — Licence — Renewal—Notice of intention to oppose
See Licensing Acts. 2. [502

MASTER AND SERVANT—Negligence of driver —Liability of proprietor - - 281
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—— Negligence — Common employment — Contractor and sub-contractor - - 508
See Negligence.

MEDICAL PRACTITIONER—*General Council of Medical Education — Jurisdiction — Removal of Name from Register—Power of Court to review Decision — Mandamus— Libel—Privilege—Publication of Minutes of General Council—Medical Act* (21 & 22 *Vict. c.* 90), *s.* 29.] By the Medical Act (21 & 22 Vict. c. 90), the General Council of Medical Education and Registration were established, one of their duties being to keep a register of medical practitioners.—By s. 29, "if any registered medical practitioner shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register":—*Held*, that if the council, acting bonâ fide and after due inquiry, have adjudged a medical practitioner to have been guilty of infamous conduct in a professional respect, the Court has no jurisdiction to review their decision.—*Ex parte La Mert* (4 B. & S. 582; 33 L. J. Q. B. 69) approved and followed.—*Held*, also, that the publication of the minutes of the council, containing a report of their proceedings, comprising a statement that the name of a specified medical practitioner has been removed from the register on the ground that, in the opinion of the council, he has been guilty of infamous conduct in a professional respect, is, if the report be accurate, and published bonâ fide and without malice, privileged, and the medical practitioner cannot maintain an action of libel against the council in respect of the publication. Allbutt v. General Council of Medical Education and Registration - - C. A. 400

METROPOLIS MANAGEMENT ACTS—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 73—57 *Geo.* 3, *c. xxix.*, *s.* 65—*Power to seize Things placed on Footway or Carriageway without Conviction.*] The power given by the

METROPOLIS MANAGEMENT ACTS—*continued.*
65th section of 57 Geo. 3, c. xxix., to the authority having control of the pavements in districts within the Act, to seize wares, merchandize, and other matters placed on footways or carriageways and not removed, when required by the authority, is not dependent upon the existence of a conviction under that section, but may be exercised although there has not been such a conviction. Brackley v. Vestry of St. Mary, Battersea C. A. 486

METROPOLITAN BUILDING ACTS—*Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *s.* 26—*General Paving Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 72—*Street—General Line of Building—Projections—Pilaster encroaching on Public Footway.*] By 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), s. 72, power is given to the persons having the control of the pavements of streets in the metropolis to regulate and remove (inter alia) all projections from the fronts of houses which in their judgment are inconvenient or incommodious to passengers along the footways; and a penalty is imposed upon any owner or occupier who refuses or neglects to remove any such projection after notice.—By s. 26 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), "The following rules shall be observed as to projections. . . . . (2.) In any street or alley of a greater width than thirty feet any shop front may project ten inches and no more. (5.) Except in so far as is permitted by this section in the case of shop fronts, and with the exception of . . . . window dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street, except with the permission of the Metropolitan Board of Works. . . . ."—The respondent built upon one side of a public street four houses or shops upon four plots of ground of which he was lessee, and erected against the fronts of them five stone pilasters, forming parts of shop fronts, the bases of which pilasters encroached upon the public footway to the extent of six inches in depth. The appellants, having passed a resolution declaring the pilasters to be inconvenient and incommodious to passengers along the footway, served the respondent with a notice to remove them, and upon his default took out a summons against him under s. 72 of Michael Angelo Taylor's Act for not removing them. The magistrate dismissed the summons.—*Held* (by Denman and Hawkins, JJ., Lord Coleridge, C.J., dissenting), that s. 26 of the Metropolitan Building Act, 1855, did not amount to a repeal pro tanto of s. 72 of Michael Angelo Taylor's Act; that it only authorized projections in cases where but for a statutory prohibition they would be lawful, and did not authorize projections which would interfere with the user by the public of a public footway; and that the decision of the magistrate was wrong. Vestry of St. Mary, Islington v. Goodman - - - 154

MONOPOLY —Combination to keep up rate of freight—Engrossing particular trades—Exclusion of rival traders from combination - - - - - 598
See Conspiracy.

MORTGAGE — Debt — Charge — Assignment of debt - - - - - 239
See Assignment of Debt.

MORTGAGE—*continued.*

—— Bill of sale—Registration—Building agreement—Power of mortgagee to sell building materials - - - 465
See BILL OF SALE.

MUNICIPAL CORPORATION—*Election Petition—Trial—Corrupt and Illegal Practices—Appearance by Solicitor—Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *s.* 38—*Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 23, *Sched. III., Part II.*] By s. 38 of the Corrupt and Illegal Practices Prevention Act, 1883 (which applies to the municipal election petitions), before a person, not being a party to an election petition, nor a candidate on behalf of whom the seat is claimed, is reported by an election Court to have been guilty of any corrupt or illegal practice, the Court shall cause notice to be given to him, and, if he appears, "shall give him an opportunity of being heard by himself, and of calling evidence in his defence to shew why he should not be so reported":—*Held*, that this section excluded the right of a person charged with any corrupt or illegal practice at a municipal election to be heard by his counsel or solicitor. THE QUEEN *v.* MANSEL JONES - - - - 29

2. —— *Election Petition—Trial—Corrupt Practice—Indictable Offence—Order by Court for Prosecution of Offender—Evidence taken on Trial of Petition—Commencement of Prosecution—Corrupt and Illegal Practices Act*, 1883 (46 & 47 *Vict. c.* 51), *ss.* 38, 51, 55—*Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 28, *sub-ss.* 5, 6 (*c*).] By s. 28 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, power is given to the director of public prosecutions to attend at the trial of municipal election petitions and to prosecute for corrupt or illegal practices offenders to whom a certificate of indemnity has been refused, and by sub-s. 5, "where a person is so prosecuted for any such offence, and . . . . he does not appear . . . . the Court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted. . . . :"—*Held*, that "the evidence" which is to satisfy the Court before it makes the order means the evidence given during the trial of the petition, and that therefore a commissioner for the trial of municipal election petitions acted within his jurisdiction in ordering the prosecution of a person to whom he had refused a certificate of indemnity, and who did not appear, without rehearing the evidence affecting him, and also acted within his jurisdiction in issuing a summons under s. 28, sub-s. 6 (*c*), for his attendance before a Court of summary jurisdiction for the purpose of being formally committed for trial. THE QUEEN *v.* SHELLARD - - - - 273

3. —— *Contract by—Capacity to contract—Ultra Vires—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 140, 143, 144—*Agreement to make Annual Payments for use of Bridge in Borough for Foot Passengers, how far valid—Borough Rates, Misapplication of—Surplus of Borough Fund.*] A municipal corporation, which was subject to the Municipal Corporations Act, 1882, and a Local Improvement Act, agreed with

MUNICIPAL CORPORATION—*continued.*

a railway company for the payment to the latter of certain annual sums during a period of fifteen years in consideration that they would throw open a bridge belonging to them within the borough for the use of foot passengers free of toll. The local Act authorized rates for certain purposes not including such a bridge as the agreement referred to, and contained a provision with regard to surpluses arising from such rates analogous to that of s. 143 of the Municipal Corporations Act, 1882. An action having been brought by the Attorney-General at the instance of relators against the corporation, claiming an injunction to restrain the defendants from making the said payments out of moneys derived from the rates and a declaration that the said agreement was ultra vires and void:—*Held*, that the defendants were not entitled to apply money derived from the rates, or to make rates for the purpose of creating surpluses to be applied, to payments under the agreement, nor to bind by such agreement the application of surpluses which might arise in future years; but that the agreement was not illegal or void, and, inasmuch as surpluses might arise which might from time to time legally be applied by the direction of the town council for the time being to such agreement as being for the public benefit of the inhabitants and improvement of the borough, to such extent the agreement might have effect: and therefore that the plaintiff was entitled to a declaration in the action that the defendants were not entitled to pay any moneys which might become due under the agreement out of the borough fund, nor to make any borough or improvement rate for the purpose of such payments, with liberty reserved to the plaintiff to apply for an injunction subsequently, if the defendants manifested any intention of so misapplying their funds; but that such declaration was not to prevent the making of such payments out of any surplus there might be of the borough fund or improvement rates after applying the same to the purposes to which they were respectively legally applicable.—Sect. 140, sub-s. 4, of the Municipal Corporations Act, 1882, does not authorize payment out of the borough fund of a judgment given for a sum of money which was not legally payable out of such fund. ATTORNEY-GENERAL *v.* MAYOR, &c., OF NEWCASTLE-UPON-TYNE AND NORTH-EASTERN RAILWAY COMPANY - - - - C. A. 492

—— Costs—Certiorari to quash orders of town council—Liability of individual members of council - - - - 483
See CERTIORARI.

NEGLIGENCE—*Master and Servant—Common Employment—Contractor and Sub-contractor.*] Builders contracted with a landowner to build certain houses, the contract providing that the defendants, a firm of ironfounders (selected by the landowner's architect), should lay a fireproof roofing on the houses, for which the builders were to pay 213*l.*, and were also to provide scaffolding and other assistance. The defendants employed their own workmen In the course of the work the plaintiff, one of the builders' workmen, was injured by the negligence of one of the defendants'

NEGLIGENCE—*continued.*

workmen:—*Held*, by Cotton and Lopes, L.JJ. (Fry, L.J., dissenting), that the defendants were sub-contractors under the builders; that they and their workmen must be taken to have been in the employment of the builders; that the man who caused the injury and the plaintiff were consequently under a common master and engaged in a common employment, and that the action could not be maintained.—By Fry, L.J., that the defendants were independent contractors; that, whether they were sub-contractors or not, their workmen were not in the service of the builders; that the man who caused the injury and the plaintiff were not under a common master, although they were engaged in a common employment, and therefore that the defendants were not exempt from liability to the plaintiff. JOHNSON *v.* LINDSAY - - - - - C. A. 508

—— Hackney carriage—Negligence of driver—Liability of proprietor—Metropolitan Hackney Carriages Acts, 1 & 2 Wm. 4, c. 22, 6 & 7 Vict. c. 86 - - 281
See HACKNEY CARRIAGE.

NOTICE OF ACTION—*Local Government Acts—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 264—*Action for Injunction—Damages in Substitution for Injunction—Chancery Amendment Act*, 1858 (21 & 22 *Vict. c.* 27), *s.* 2.] Where an action against a sanitary authority was bonâ fide and in substance brought for an injunction to prevent them from causing a nuisance in the future by continuing to discharge sewage into a stream, but the judge at the trial thought that under the circumstances an injunction was not then needed, because, though a nuisance was caused by such discharge of sewage in an exceptionally dry season, which at the time of the trial had passed away, it was not likely to recur except in such a season, and he accordingly refused an injunction, but gave 25*l.* damages:—*Held*, that he had power to give such damages in substitution for an injunction in accordance with the Chancery Practice under Lord Cairns' Act, though no notice of action had been given as required by s. 264 of the Public Health Act, 1875. CHAPMAN, MORSONS & CO. *v.* GUARDIANS OF AUCKLAND UNION 294

ORDER—Service—Enforcement of order - 126
See PRACTICE. 13.

PEW—Church—Right appurtenant to house—Long user and acts of ownership—Presumption of legal origin - - 48
See ECCLESIASTICAL LAW.

POLICY—Fire insurance—Slip of policy, effect of - - - - - - 361
See INSURANCE, FIRE.

PRACTICE—*Costs—Solicitor and Client—Taxation—Disbursement—Probate Duty*—6 & 7 *Vict. c.* 73, *s.* 37.] A payment for probate duty made by a solicitor on behalf of his client is a "disbursement" within the meaning of s. 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), and is properly included in his bill of costs. IN RE LAMB 5

PRACTICE—*continued.*

2. —— *Costs—Judgment under Order XIV. for* 20*l. or upwards, Part of Claim—Judgment at Trial for Balance—Less than* 50*l. recovered—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.] By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116, if in an action founded on contract the plaintiff shall recover a sum of 20*l.* or upwards, but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court. Provided that, if in any action founded on contract the plaintiff shall within twenty-one days after the service of the writ, or within such further time as may be ordered by the High Court or a judge thereof, obtain an order under Order XIV. empowering him to enter judgment for 20*l.* or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court.—The plaintiff, in an action founded on contract, claimed 48*l.* He obtained leave under Order XIV. to sign judgment for 45*l.*, and proceeding to trial recovered the balance of his claim with costs:—*Held*, that he was entitled by s. 116 of the County Courts Act, 1888, to the costs of the whole action on the High Court scale, although he had recovered less than 50*l.* BARKER *v.* HEMPSTEAD - - 8

3. —— *Costs—Jurisdiction of Judge to deprive Plaintiff of Costs—"Good Cause"—Order LXV., r.* 1.] Letters or conversations written or declared to be "without prejudice" cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs. WALKER *v.* WILSHER - C. A. 335

4. —— *County Court—Appeal from—County Court Judge's Notes—Duty of Appellant to supply Copies of Notes for use on Appeal—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 121—*Order LVIII., r.* 11—*Order LIX. (rr.* 13, 17.] Order LIX., r. 13, which makes it the duty of the Master of the Crown Office, upon the entry of an appeal from an inferior Court, to apply to the judge of the inferior Court for a copy of his notes, is repealed by s. 121 of the County Courts Act, 1888, and it is now the duty of the appellant, as a condition precedent to the appeal being heard, to furnish the Court with a copy of the notes. MCGRAH *v.* CARTWRIGHT - - - - - 3

5. —— *County Court, Application for Prohibition to—Appeal to Court of Appeal—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 128—*New Trial in County Court—Action struck out for Want of Jurisdiction*—9 & 10 *Vict. c.* 95, *s.* 89—30 & 31 *Vict. c.* 142, *s.* 14] An appeal lies without leave from the decision of a Divisional Court upon an application for a prohibition to a county court.—A county court judge struck a case out under s. 14 of the County Courts Act, 1867, for want of jurisdiction, but subsequently, being of opinion that his decision as to jurisdiction was erroneous, ordered a new trial:—*Held*, that he had power to order a new trial in such a case. LISTER *v.* WOOD [C. A. 229

6. —— *Discontinuance of Action—Notice—Costs—"Proceeding taken in action after receipt of defence"—Claim and Counter-claim—Payment of Money into Court by Defendant, and acceptance by Plaintiff in satisfaction—Payment of Money*

PRACTICE—*continued.*

into Court by Plaintiff in satisfaction of Counter-claim—Rules of Supreme Court, 1883, *Order* XXVI., *r.* 1.] By Order XXVI., *r.* 1, the plaintiff may at any time after the receipt of the defendant's defence, "before taking any other proceeding in the action (save any interlocutory application) by notice in writing wholly discontinue his action against all or any of the defendants."—In an action by the holder against the acceptor and the drawer of a bill of exchange, the acceptor paid money into court in satisfaction of the claim, while the drawer delivered a defence denying liability, and set up a counter-claim. The plaintiff, after receipt of the defence, paid into court the amount of the counter-claim, and took out of court the amount paid in by the acceptor, and then gave the drawer notice of discontinuance:—*Held*, that the plaintiff had not "taken any proceeding in the action after receipt of the defence" such as to prevent him from giving notice of discontinuance. SPINCER *v.* WATTS - - - C. A. 350

7. —— *Discovery—Interrogatories—Several Defendants—Deposit of* 5*l.—Order* XXXI., *r.* 26.] By Order XXXI., r. 26, "any party seeking discovery by interrogatories shall before delivery of interrogatories pay into court . . . the sum of 5*l.*"—The plaintiff in an action against several defendants delivered separate copies of the same set of interrogatories to the defendants respectively, each defendant being required to answer particular interrogatories only:—*Held*, that, in the circumstances, the plaintiff need not pay into court more than one sum of 5*l.*—By the latter part of rule 26 the party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment of 5*l.* has been made:—*Held*, that this provision does not, in the event of non-payment of the 5*l.*, entitle the party from whom discovery is sought to apply for an order to strike out the interrogatories. EDER & Co. *v.* ATTENBOROUGH - - - 130

8. —— *Discovery—Documents of Title—Privilege—Affidavit of Documents—Interrogatories in Contradiction of—Contentious Affidavit.*] The defendant in an action for recovery of land having made an affidavit of documents, which stated that he had in his possession certain documents tied up in a bundle marked with the letter A, and that he objected to produce such documents on the ground that they related solely to his own title and did not in any way tend to prove or support the title of the plaintiffs, the plaintiffs administered an interrogatory to the defendant, asking whether such documents did not include a particular document mentioned and relied upon by the plaintiffs in their statement of claim. The defendant objected to answer such interrogatory. The plaintiffs thereupon applied for an order that the defendant should further answer the interrogatory, and on such application sought to make use of an affidavit in contradiction of defendant's affidavit of documents:—*Held*, that a contentious affidavit was not admissible to contradict the defendant's affidavit of documents, and that the plaintiffs were not entitled to a further answer. MORRIS *v.* EDWARDS - - - C. A. 287

9. —— *Production of Documents—Privileged Communications—Order* XXXI., *rr.* 15–18.] A successful plaintiff in a Chancery action, brought to restrain the infringement of his trade-mark, drafted an advertisement of the proceedings in and result of the action for publication in a trade journal; before publication the draft was submitted to counsel, and the advertisement as settled by him was published. One of the defendants in the Chancery action, alleging the advertisement to be libellous, brought an action for libel in respect of its publication, and sought to obtain inspection of the draft advertisement:—*Held*, that the document was privileged from production within the rule as to professional privilege adopted in *Minet* v. *Morgan* (Law Rep. 8 Ch. 361).—*Wheeler* v. *Le Marchant* (17 Ch. D. 675) commented on. LOWDEN *v.* BLAKEY - - 332

10. —— *Discovery—Libel—Action against Proprietor of Newspaper—Admission of Publication—Interrogatories as to Name of Writer of alleged Libel.*] In an action of libel against the proprietor of a newspaper, if the defendant admits the publication of the words complained of, the plaintiff is not entitled to interrogate the defendant as to the name of the writer of the words, unless the identity of such writer is a fact material to some issue raised in the case. GIBSON *v.* EVANS [384

11. —— *Evidence—Inspection of Bankers' Books—Bankers' Books Evidence Act*, 1879 (42 & 43 *Vict. c.* 11), *s.* 7.] The Bankers' Books Evidence Acts, 1879, gives power to order inspection of entries in bankers' books relating to banking accounts kept in the names of other persons besides the parties to the action. HOWARD *v.* BEALL 1

12. —— *Garnishee Order—Attachment of Debt—Balance in Hands of Garnishee—Order* XLV., *rr.* 1, 2.] The defendant acted as banker to the plaintiff and held a sum of money to his credit. A judgment in another action was obtained against the plaintiff, and all debts in the hands of the defendant were attached to answer such judgment. The amount in the hands of the defendant exceeded the amount of the judgment. The plaintiff drew cheques against the balance which were presented and dishonoured:—*Held*, affirming the judgment of the Queen's Bench Division, that the defendant was not bound to honour the cheques so drawn, and that his refusal to do so gave the plaintiff no cause of action. ROGERS *v.* WHITELEY - - - - C. A. 236

13. —— *Order for Judgment under Order* XIV.—*Drawing up and Serving—Order* LII., *r.* 14.] An order for giving leave to sign judgment under Order XIV., unless a sum is paid before a day named, need not be served upon the defendant before judgment is signed upon it. HOPTON *v.* ROBERTSON - - - - 126, n.

14. —— *Libel—Payment into Court with Defence denying Liability—Justification of Part of Words used and Payment into Court as to Remainder—Embarrassing Pleading—Rules of the Supreme Court*, 1883, *Order* XXII., *r.* 1.] In an action of libel the defendant by his defence admitted the publication of the words but denied the innuendoes, and pleaded that to the extent of the facts thereinafter stated the words were true in substance and in fact. The defence then set

PRACTICE—*continued.*

out seriatim a number of facts, and finally contained an admission that the words were not wholly justified by the facts thereinbefore mentioned; and the defendant paid 40*s.* into court in satisfaction of the plaintiff's claim:—*Held*, that this defence was bad, and, unless amended, must be struck out as contrary to Order XXII., r. 1, and also as being embarrassing, inasmuch as it left in doubt what the defendant justified and what he did not. FLEMING *v.* DOLLAR - - 388

15. —— *Service of Writ—Foreign Corporation carrying on Business in England—Order IX., r. 8.*] A foreign corporation carrying on business in this country is liable to be sued in an English court, and may be served in the same manner as an English corporation aggregate. Therefore service of a writ of summons on the head officer at the place of business in England of such a foreign corporation is good service on the corporation under Order IX., r. 8.—*Newby* v. *Van Oppen* (Law Rep. 7 Q. B. 293) followed. HAGGIN *v.* COMPTOIR D'ESCOMPTE DE PARIS. MASON AND BARRY *v.* THE SAME - - - C. A. 519

16. —— *Service of Writ—Foreign Partnership carrying on Business in England.*] A foreign partnership the members of which are foreigners resident out of the jurisdiction, but carrying on business in this country, cannot be served under Order IX., r. 6, by service on the manager at their principal place of business within the jurisdiction. —*O'Neil* v. *Clason* (46 L. J. (Q.B.) 191) overruled. RUSSELL *v.* CAMBEFORT - C. A. 526

17. —— *Service of Writ—Scotch Corporation with Branch Office in England—Action for Breach of Contract—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 62—*Order IX., r.* 8.] A company having its registered office in Scotland, but also carrying on its business within the jurisdiction of the High Court, cannot be served with a writ of summons within the jurisdiction. WATKINS *v.* SCOTTISH IMPERIAL INSURANCE COMPANY - - 285

18. —— *Substituted Service of Writ—Defendant out of Jurisdiction—Irregularity in Procedure —Waiver—Rules of Supreme Court*, 1883, *Order II., rr.* 4, 5; *Order XI.; Order LXX., rr.* 1, 2.] A writ was issued in the general form, without the leave of the Court, against a person who at the date of the writ was out of the jurisdiction. The plaintiff obtained an order for substituted service of the writ within the jurisdiction, and, having served the writ in accordance with the order, signed judgment against the defendant for default of appearance. The defendant took out a summons asking that the judgment might be set aside, and that the plaintiff might be ordered to deliver a statement of claim:—*Held*, that the order for substituted service was not void, but that it was only an irregularity which could be waived, and that by taking out the summons for the plaintiff to deliver a statement of claim the defendant had waived the irregularity, and was not entitled to have the judgment set aside. FRY *v.* MOORE [C. A. 395

19. —— *Setting aside Judgment—Service of Order, when Necessary—Affidavit Shewing Merits. Necessity for — Rules of Supreme Court*, 1883, *Order XXXI., r.* 21, *Order XLI., r.* 5, *Order XLVII., r.* 2, *Order LII., rr.* 13, 14.] Interrogatories for the examination of the defendant were delivered by the plaintiffs on January 17. On February 5, the defendant not having filed answers, an order was made that if he should not file answers within three days judgment might be signed against him. On February 9, no affidavit having been filed by the defendant, the plaintiffs signed judgment under this order. On application by the defendant to set aside the judgment he stated on affidavit that on February 9 a copy of the order of February 5 had been left at his house and received by him, and that he in consequence filed on February 11, and as he supposed within the three days named in the order, answers to interrogatories which he had sworn on January 28. No affidavit shewing that he had a defence on the merits was filed by the defendant:—*Held*, that the order did not require to be served, that the judgment was therefore regular, and that, in the absence of an affidavit shewing that he had a defence on the merits, the defendant was not entitled to have the judgment set aside.—The judgment of Field, J., in *Hopton* v. *Robertson* (W. N. 1884, p. 77) approved. FARDEN *v.* RICHTER [124

20. —— *Third Party Notice—Service out of the Jurisdiction—Rules of Supreme Court*, 1883, *Order XI., r.* 1 (*e*); *Order XVI., r.* 48.] Where, in an action for a breach within the jurisdiction of a contract which according to the terms thereof ought to be performed within the jurisdiction, the defendant claims to be entitled to an indemnity from a third party, the Court may allow service out of the jurisdiction of a notice of such claim, unless the third party is domiciled or ordinarily resident in Scotland or Ireland. DUBOUT & CO. *v.* MACPHERSON - - - - - 340

—— Habeas corpus—Disobedience to writ—Attachment—Appeal to Court of Appeal
See HABEAS CORPUS. [305

—— Appeal to Court of Appeal—Re-hearing—Enlargement of time - - 477
See SOLICITOR.

PRIVILEGE—Production of documents of title
See PRACTICE. 8. [287

—— Production of documents—Communication to counsel - - - - 332
See PRACTICE. 9.

—— Libel—General Council of Medical Education—Removal of name from register—Publication of minutes of general council
See MEDICAL PRACTITIONER. [400

PROBATE DUTY—Solicitor — Disbursements — Costs—Taxation - - - 5
See PRACTICE.

RAILWAY AND CANAL COMMISSION—*Jurisdiction—Practice—Order requiring Railway Company to divide Rates in Rate-books—Evidence necessary to support Application—"Any person interested"—Power to make Order in Cases in which a Railway Company books to Stations not on its own Line—Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 14—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25),

RAILWAY AND CANAL COMMISSION—*contd.*

ss. 14, 33, 34.] By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 14, "Every railway company and canal company shall keep at each of their stations and wharves a book or books shewing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged.—The commissioners may from time to time on the application of any person interested make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses."—*Semble*, that the expression "person interested" in s. 14 is not limited to persons paying the rates which are the subject of the application.—*Semble* (per Wills, J., and Mr. Commissioner Price), that the expression "person interested" in the section includes any person who makes out by proper evidence that the rates which he seeks to have distinguished are really and substantially competitive rates with his own, and (per Commissioner Sir F. Peel) that it includes "all persons who have a bonâ fide interest in knowing how the particular rates which are the subject of their application are made up."—*Semble*, that the Court has power under the section to require a railway company to distinguish rates in its rate-books in cases in which the company books traffic to stations which are not upon its own line. BETWEEN THE PELSALL COAL AND IRON COMPANY, LIMITED, APPLICANTS, AND THE LONDON AND NORTH-WESTERN RAILWAY COMPANY, DEFENDANTS - (Ry. & C. Comm.) 536

RAILWAY COMPANY—General district rate—Assessment—Rural authority—Powers for lighting district - - 555
See LOCAL GOVERNMENT ACTS. 4.

RATE—Railway—Order requiring railway company to divide rate in rate-books 536
See RAILWAY AND CANAL COMMISSION.

REGISTRATION—Bill of sale—"Defeasance or condition"—Collateral security—Life policy - - - - 566
See BILL OF SALE. 2.

REVENUE—*Income Tax—Banker—Loan for less than a Year—Payment of Interest—Deduction of Income Tax—"Yearly interest of money or any annuity or other annual payment*—16 & 17 *Vict. c.* 34, *s.* 40.] Interest upon a loan by a banker to a customer for a period of less than a year is not within the words "any yearly interest of money or any annuity or other annual payment" in 16 & 17 Vict. c. 34, s. 40, and therefore the customer is not entitled to deduct the income tax from such interest.—So *held*, reversing the decision of the Queen's Bench Division (22 Q. B. D. 153).—*Bebb* v. *Bunny* (1 K. & J. 216) distinguished. GOSLINGS & SHARPE *v.* BLAKE C. A. 324

REVENUE—*continued.*

2 —— *Stamp—Ad valorem Duty—"Conveyance on Sale"—Agreement for Sale of Goodwill of Business—Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *Sched. and s.* 70.] The schedule to the Stamp Act of 1870 imposes an ad valorem duty on every "conveyance or transfer on sale of any property."—By s. 70 "The term 'conveyance on sale' includes every instrument . . . whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser".—*Held*, affirming the judgment of the Queen's Bench Division, that an agreement for the sale of the goodwill of a business, the effect of which in equity, as between the vendor and the purchaser, was to make the purchaser the owner, and of which a Court of Equity would have decreed the specific performance in the event of the vendor not fulfilling his contract, was not within s. 70, and was not, therefore, liable to ad valorem duty under the Act. COMMISSIONERS OF INLAND REVENUE *v.* G. ANGUS & CO. THE SAME *v.* J. LEWIS AND SONS - - - - C. A. 579

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SHERIFF—*Action against, for taking Defaulting Debtor to Prison within Twenty-four hours of Arrest—"Attachment for Debt," Meaning of—Punitive Character of Orders under Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5—*Consolidation Statute—Construction of Words applicable to former State of the Law*—32 *Geo.* 2, *c.* 28, *s.* 1—*Sheriffs Act,* 1887 (50 & 51 *Vict. c.* 55), *s.* 14 (1).] A judgment debtor arrested by the sheriff by virtue of an order under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for making default in payment of the debt, suffers imprisonment as a punishment for contumacious conduct, and is not a person arrested by virtue of an "attachment for debt" within the meaning of s. 14 (1) of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55). The sheriff need not, therefore, wait twenty-four hours after the arrest before taking such debtor to prison. —*In re Ryley* (15 Q. B. D. 329) considered.—Having regard to the fact that the Sheriffs Act, 1887, is a consolidation statute, s. 14 (1) being a re-enactment of 32 Geo. 2, c. 28, s. 1, the Court refused to put upon the words "attachment for debt" in the Sheriffs Act a construction which they did not otherwise properly bear, although by reason of alterations in the law between the dates of the two Acts it might be difficult in any other way to give effect at the present time to those words. MITCHELL *v.* SIMPSON - 373

SOLICITOR—*Striking off Roll—Re-admission—Petition—Jurisdiction—Attorneys and Solicitors Act* (6 & 7 *Vict. c.* 73), *s.* 32—*Practice—Appeal—Dismissal—Re-hearing—Enlargement of Time.*] Although, upon an application to strike a solicitor off the rolls for an offence under s. 32 of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73), such as allowing an unqualified person to practise in his name, the Court may have a discretionary power to inflict a punishment short of striking him off the rolls, yet, if the Court does make an order striking him off, it has no power afterwards to reinstate him, the direction in the section being

SOLICITOR—*continued.*

absolute that, as the consequence of such an order, he shall for ever thereafter be disabled from practising as a solicitor.—*Semble,* where an appeal has been dismissed through the non-appearance of the appellant, the Court has no jurisdiction, on a subsequent application by the appellant, to enlarge the time for appealing. IN RE LAMB C. A. 477

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